90-93

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

R. DOBIE LANGENKAMP, SUCCESSOR TRUSTEE OF THE BANKRUPTCY ESTATES OF REPUBLIC TRUST & SAVINGS COMPANY AND REPUBLIC FINANCIAL CORPORATION
Petitioner,

v.

C. A. CULP, JULIA CULP, CULP DISTRIBUTING COMPANY, LEROY DENNIS, AND JANET DENNIS
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July 9, 1990

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QUESTIONS PRESENTED

I. Did the Tenth Circuit Court of Appeals violate this Court's *Granfinanciera* decision (109 S. Ct. 2782 (1989)) by affording a Seventh Amendment jury trial to several creditors being sued by the bankruptcy trustee to recover preferential transfers, even though those creditors had already submitted claims against the bankruptcy estate, and even though *Granfinanciera* explicitly denies a Seventh Amendment jury trial to creditors who file bankruptcy claims and who are then subjected to a preference action in the process of allowing and disallowing bankruptcy claims?

II. Did the Tenth Circuit Court of Appeals create an inter-circuit conflict by (mis)reading this Court's *Granfinanciera* decision (109 S. Ct. 2782 (1989)) as permitting a jury to try the bankruptcy trustee's preference actions under 11 U.S.C. §§ 547(b), 550(a) against creditors who had already filed claims in the bankruptcy case, when other circuits and other lower courts have uniformly and correctly read *Granfinanciera's* plain holding that if a creditor files a claim in the bankruptcy case, the bankruptcy trustee's preference challenge against the creditor must be tried to the bankruptcy court, as in equity?

LIST OF PARTIES

Petitioner and all Respondents are named in the caption and were also parties before the U.S. Tenth Circuit Court of Appeals. The following parties were before the Tenth Circuit but are not before this Court by reason of this petition: P. A. Hackler, Delores Hackler, Kenneth D. Moore, Mary L. Moore, Kemal Saied, Constance Saied, and Hattie Lou Gesin. Petitioner believes that these seven (7) parties have no interest in the outcome of this petition for certiorari filed by Petitioner. A notice complying with Rule 12.4 of this Court will be served on each of these seven (7) parties, as well as upon all other parties to the proceeding below, namely, the Respondents shown in the caption.

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, Petitioner lists below the parent companies, subsidiaries, or affiliates of (i) Republic Trust & Savings Company, and (ii) Republic Financial Corporation. Petitioner became the successor trustee for the bankruptcy estates of these two corporations.

A. *Concerning Republic Trust & Savings Company:* Republic Trust & Savings Company has also done business as Western Trust & Savings Company. Republic Trust & Savings Company is owned by Republic Bancorporation, Inc., which is owned by Republic Bancorporation, Inc. of Oklahoma. All of the stock of Republic Bancorporation, Inc. of Oklahoma is owned by the McKinney Children's Trusts. The trustees of the McKinney Children's Trusts are Wesley R. McKinney and Wilma Wood. The beneficiaries of the trusts are the children of Wesley R. McKinney. Republic Trust & Savings Company has no corporate subsidiaries.

B. *Concerning Republic Financial Corporation:* Republic Financial Corporation is owned by Republic Bancorporation, Inc., which is owned by Republic Bancorporation, Inc. of Oklahoma. All of the stock of Republic Bancorporation, Inc. of Oklahoma is owned by the McKinney Children's Trusts. The trustees of the McKinney Children's Trusts are Wesley R. McKinney and Wilma Wood. The beneficiaries of the trusts are the children of Wesley R. McKinney. Republic Financial Corporation has no corporate subsidiaries.

C. Republic Trust & Savings Company and Republic Financial Corporation are affiliates. They have no other affiliates except as set forth above.

D. Petitioner, R. Dobie Langenkamp, is the duly appointed Successor Trustee of the Bankruptcy Estates of Republic Trust & Savings Company and Republic Financial Corporation. The initial trustee of these bankruptcy estates was Mr. Jack D. Jones.

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No._____

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

R. Dobie Langenkamp, Successor Trustee of the Bankruptcy Estates of Republic Trust & Savings Company and Republic Financial Corporation ("Petitioner") asks this Court for a writ of certiorari to review the March 5, 1990 decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion below is officially reported at 897 F.2d 1041 (10th Cir. 1990). A-82.[1] In that opinion, the Tenth Circuit reversed a consolidated order of the United States District Court for the Northern District of Oklahoma. A-67. Part of this reversed order had denied a jury trial to Respondents, who were defendants below in the preference actions against them by the bankruptcy trustee, Petitioner here. The District Court's consolidated order itself had affirmed unconsolidated judgments of the Bankruptcy Court for the Northern District of Oklahoma, which also denied a jury trial to Respondents. A-16, A-19, A-43(¶3), A-61(¶3).

JURISDICTION

The Tenth Circuit Court of Appeals filed its opinion on March 5, 1990. A-82. Petitioner timely sought rehearing, which the Tenth Circuit denied on April 10, 1990. A-94-96. Jurisdiction lies under 28 U.S.C. § 1254(1) for this Court to review the final decision of the Tenth Circuit Court of Appeals. This petition for certiorari is being filed under Rules 13.1 and 13.4 of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

This case involves the following constitutional provisions, statutes, and regulations, which are fully reprinted in the Appendix: U.S. Const. amend. VII; 11 U.S.C. §§ 502(d), 547(b), 550(a).

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[1]The Appendix to this petition is cited as "A-____."

STATEMENT OF THE CASE

This case concerns the availability of a Seventh Amendment jury trial to a creditor who submits a claim against a bankruptcy estate and is then sued by the trustee in bankruptcy to recover an allegedly preferential monetary transfer. Respondents here are five such creditors. Each filed a claim against the bankruptcy estate of Republic Trust & Savings Company ("RTS"). RTS was an uninsured (non-bank) financial institution. Persons in Oklahoma invested money in RTS and received in return "thrift certificates" and "passbook savings certificates."

Each certificate had a maturity date and represented a debt owed by RTS to the creditor who held the certificate. When RTS filed bankruptcy in September of 1984, all five Respondents held RTS thrift or passbook certificates that had either not yet matured or had matured but been unpaid. As creditors, then, Respondents chose to submit claims in the RTS bankruptcy case: C. A. Culp, Julia Culp, and Culp Distributing Company (the "Culps") filed their proof of claim in October of 1984; Leroy Dennis and Janet Dennis (the "Dennises") also filed their proof of claim in October of 1984. A-23.

Apart from these claims, both the Culps and the Dennises had already received cash payments from RTS on some matured certificates. These payments had occurred during the 90-day preference period preceding the RTS bankruptcy filing. The first-appointed bankruptcy trustee of RTS, Mr. Jack D. Jones, sued the Culps and the Dennises in bankruptcy court to recover from them the sums paid by RTS during the 90-day reachback period of 11 U.S.C.

§ 547(b). Petitioner here, Mr. R. Dobie Langenkamp, took over these preference actions when he was appointed successor trustee of the RTS bankruptcy estate.

The process of allowing and disallowing claims in the RTS and RFC bankruptcies unfolded as the bankruptcy trustees (initial and successor) sought to have the Culps' and the Dennises' proofs of claim disallowed under 11 U.S.C. § 502(d) until the preference proceedings against them were concluded. A-5, A-9, A-10-11. The bankruptcy court so ordered. A-12-14.

Thereafter, the preference actions against the Culps and the Dennises were consolidated for trial with similar preference actions against several other defendants who are not Respondents to this petition: P. A. and Delores Hackler (the "Hacklers"), Kemal and Constance Saied (the "Saieds"), Kenneth and Mary Moore (the "Moores"), and Hattie Lou Gesin. Like the Culps and the Dennises, Ms. Gesin had received a cash transfer within 90 days before RTS filed bankruptcy. But unlike the Culps and the Dennises, Ms. Gesin at no time lodged a claim against the RTS bankruptcy estate. As appears more fully in the "Reasons for Granting Certiorari" section below, this distinction bears crucially on the entitlement to a jury trial.

The Hacklers, the Saieds, and the Moores had obtained their thrift or passbook certificates from another uninsured financial institution, Republic Financial Corporation ("RFC"). RFC and RTS were sister corporations. They issued thrift and passbook certificates the same way. They also filed bankruptcy on the same day. Mr. Jack Jones was initial bankruptcy trustee of both institutions. Petitioner here, Mr. Dobie Langenkamp, became successor trustee likewise of both RTS and RFC.[2]

The Hacklers, the Saieds, and the Moores received cash payments from RFC during the 90-day period before RFC's bankruptcy, just as Respondents here (the Culps and the Dennises) had received pre-bankruptcy payments from RTS. But the Hacklers, the Saieds, and the Moores at no time lodged a claim against the bankruptcy estate of their debtor RFC. So they differed in this key respect from the Culps and the Dennises who had indeed submitted claims against the RTS bankruptcy estate.

Nevertheless, Respondents and the other preference defendants requested a jury trial on the trustee's preference actions against them. The bankruptcy court denied all requests without distinguishing the claim filers (Culps and Dennises) from the non-filers (all other preference defendants).

Following a consolidated non-jury trial in June of 1987, the bankruptcy court found that Respondents and the other preference defendants had to return to the RTS and RFC bankruptcy estates the pre-bankruptcy transfers because those transfers constituted avoidable preferences under 11 U.S.C. §§ 547(b) and 550(a). A-83-84.

Respondents and the other preference defendants appealed to the District Court for Oklahoma's Northern District. There they sought reversal of both the preference

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[2]Mr. Langenkamp appears as Petitioner here in both trustee capacities because both bankruptcy estates have an interest in the outcome of this petition for certiorari. *See* S.Ct. Rule 12.4.

rulings and the jury trial denials. Through a consolidated order, the district court affirmed the bankruptcy court in all respects. A-81.

Respondents and the other preference defendants pressed their appeal to the Tenth Circuit Court of Appeals. Again, they challenged the preference rulings against them and sought the jury trial denied to them. The Tenth Circuit consolidated all separate appeals into one appeal for briefing and decision. Briefing was concluded in October of 1988.

Eight months later in June of 1989, this Court decided *Granfinanciera, S.A. v. Nordberg*, 109 S.Ct. 2782 (1989). For jury trial purposes, this decision emphasizes the distinction between claim-filing creditors and persons who do not file a claim against the bankruptcy estate. For the appeal still before the Tenth Circuit, this distinction would mean that the Culps and the Dennises (Respondents here) had no Seventh Amendment right to a jury trial on the preference actions against them because they did file claims against the RTS bankruptcy estate.[3]

Even so, when the Tenth Circuit issued its opinion some nine months later in March of 1990, the court did not follow this key distinction of *Granfinanciera*. The Tenth Circuit correctly rejected all the legal arguments of Respondents and the others that would have resolved the preference issues as questions of law. Yet the Tenth Circuit held that *everyone* was entitled to a jury trial on the factual

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[3]All the other preference defendants below (the Hacklers, the Saieds, the Moores, and Ms. Gesin) would be entitled to a jury trial because they filed no bankruptcy claims.

questions in the preference actions. The court's opinion acknowledged that Respondents had filed bankruptcy claims while the other preference defendants had not, but the opinion glossed over this distinction with a single sentence:

> Despite these appellants' [Respondents'] claims, the trustee's [Petitioner's] actions to avoid the transfers, consolidated by the bankruptcy court, were plenary rather than a part of the bankruptcy court's summary proceedings involving the "process of allowance and disallowance of claims."

A-93. Petitioner asked the Tenth Circuit for a rehearing on the jury trial (mis)granted to Respondents. In support of rehearing, Petitioner pointed out that *Granfinanciera* leaves no doubt about the distinction between a claim filer and a non-filer: He who files a bankruptcy claim simply has no Seventh Amendment right to a jury trial in a preference action. Petitioner also pointed out that *Granfinanciera* plainly looks away from whether the preference action is labelled a "plenary" or "summary" proceeding in bankruptcy. Instead, *Granfinanciera* says that when a creditor files a proof of claim, the proof itself and the preference challenge together become integral parts of the "process of allowance and disallowance of claims" -- a process wholly "triable in equity." 109 S.Ct. at 2799. Finally, Petitioner pointed out that other circuits and other lower courts have read and applied *Granfinanciera* with precisely this distinction in mind, so that an inter-circuit conflict would result if the Tenth Circuit opinion were not modified to deny Respondents a jury trial. A-102, A-103, A-104.

On April 10, 1990, the Tenth Circuit denied rehearing without comment. A-94-96. Thus, the Culps and the Dennises (Respondents here), along with the Hacklers, the Saieds, the Moores, and Ms. Gesin, will now all have the preference actions against them tried to a jury. But under *Granfinanciera*, the Culps and the Dennises should simply not get a jury trial since they filed claims against the RTS bankruptcy estate.[4] Petitioner therefore asks this Court for a writ of certiorari to correct the grievous Seventh Amendment error of the Tenth Circuit and to avoid a conflict among the circuits on the question of jury trials in preference actions. At the very least, Petitioner asks this Court to reverse and remand the case with instructions to reconsider and follow the *Granfinanciera* holding which the Tenth Circuit glossed over when it disregarded the distinction between claim filers like Respondents and non-filers like the other preference defendants.

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari in this case for two reasons:

(i) the Tenth Circuit Court of Appeals has violated this Court's *Granfinanciera* decision by holding that all preference actions are triable to a jury, while *Granfinanciera* holds that a preference defendant does not have a Seventh Amendment right to a jury trial when he has asserted a claim against the bankruptcy estate (*see* S.Ct. Rule 10.1(c)); and

(ii) the Tenth Circuit Court of Appeals has created a conflict among circuit courts of appeals by permitting a jury trial to all preference defendants, while other circuits have permitted a jury trial only to preference defendants who themselves have not filed claims against the bankruptcy estate (*see* S.Ct. Rule 10.1(a)).

[4]Petitioner concedes that the Hacklers, the Saieds, the Moores, and Ms. Gesin are entitled to a jury trial because they did not file or assert claims against either the RTS or RFC bankruptcy estates.

The writ of certiorari is thus needed here to safeguard the jury-trial rule pronounced in *Granfinanciera* and to avoid the inter-circuit conflict that the Tenth Circuit's opinion has created on the question of Seventh Amendment jury trials in bankruptcy preference actions. The Tenth Circuit's answer to this question not only has widespread importance to a great number of bankruptcy litigants across the nation, but will severely disrupt bankruptcy practice as a whole.[5] In the RTS and RFC bankruptcies alone, over 100 other preference defendants stand precisely in Respondents' shoes. All await trial on the preference issue after having filed a claim against the bankruptcy estate. Unless this Court grants certiorari relief, a vast amount of judicial resources will be wasted from conducting 100 jury trials now mandated by the Tenth Circuit's opinion but not warranted by *Granfinanciera*. Even more resources will be

[5]This Court recently granted certiorari on a related question left unanswered by *Granfinanciera:* whether a bankruptcy judge has authority to conduct jury trials in preference actions when the preference defendant does have a right to a jury trial. *See In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990), *cert. granted*, _____ U.S.L.W. _____ (U.S. June 28, 1990) (No. 89-1784).

wasted as judges throughout the circuits try to sort out the confusion and conflict from the Tenth Circuit's opinion versus *Granfinanciera* and its progeny in other circuits. Only certiorari relief from this Court can right the constitutional wrong committed here and prevent this great waste.

(I)

The Tenth Circuit's opinion has violated *Granfinanciera* by allowing Seventh Amendment jury trials to several claim-filing creditors sued in bankruptcy preference actions, even though *Granfinanciera* explicitly denies a jury trial to such creditors who have filed claims against the bankruptcy estate.

The constitutional error committed here is simple. The Tenth Circuit's opinion recognized that some defendants had filed proofs of claim in bankruptcy, while others had not. Respondents (the Culps and the Dennises) are the ones who did file. They were creditors of RTS when the RTS bankruptcy commenced. And they filed their proofs of claim before the preference actions were initiated against them. A-90 n.3. The Tenth Circuit nevertheless held that the preference actions against the Culps and the Dennises were triable to a jury despite their earlier filed bankruptcy claims. This plainly violates the jury-trial rule of *Granfinanciera, S.A. v. Nordberg*, 109 S.Ct. 2782 (1989).

In *Granfinanciera*, the defendants seeking a jury trial were accused of having received fraudulent monetary transfers from the bankruptcy debtor's property. The lower courts in the case denied these defendants a jury trial essentially by characterizing the fraudulent conveyance

action against the defendants as a "core proceeding" triable by the bankruptcy judge sitting without a jury. This Court rejected this kind of analysis and concluded that the action was triable to a jury solely because the *Granfinanciera* defendants had not submitted any claims of their own against the bankruptcy estate:

> We read *Schoenthal* and *Katchen* as holding that, under the Seventh Amendment, *a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate* . . . . Because petitioners here, like the petitioner in *Schoenthal*, have not filed claims against the estate, respondent's fraudulent conveyance action does not arise "as part of the process of allowance and disallowance of claims." Nor is that action integral to the restructuring of debtor-creditor relations. Congress therefore cannot divest petitioners of their Seventh Amendment right to a trial by jury.

109 S.Ct. at 2799 (emphasis added).

The direct holding of *Granfinanciera* is that "a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate." *Id*. Here it was stipulated and undisputed that Respondents submitted written claims against the RTS bankruptcy estate. In granting a jury trial to these preference defendants who had submitted a claim against the estate, the Tenth Circuit plainly violated the direct holding of *Granfinanciera*.

The critical distinction of this Court's holding rests on the reasoning that when a creditor files a claim against a

bankruptcy estate, the creditor subjects himself to the bankruptcy court's equitable power. *See Granfinanciera*, 109 S.Ct. at 2798-99 & n.14 (citing *Katchen v. Landy*, 382 U.S. 323, 335 (1966)). Granting a jury trial to claim filers like the Culps and the Dennises obliterates the distinction so carefully and plainly drawn by this Court in *Granfinanciera*.

The Tenth Circuit's opinion acknowledges this distinction, but glosses over it with a single sentence that has virtually no reasoning and no citation to authority:

> Under *Granfinanciera*, those appellants [the Hacklers, the Saieds, the Moores, and Ms. Gesin] that did not have or file claims against the debtors' estates undoubtedly are entitled to a jury trial on the issue of whether the payments they received from the debtors within ninety days of the latter's bankruptcy constitute avoidable preferences. Although some of the appellants [the Culps and the Dennises, Respondents here] did file claims against the estates because they continued to have monies invested in the debtors at the time of bankruptcy, *see supra* n.3, we believe they likewise are entitled to a jury trial under the rationale of *Granfinanciera* and *Katchen*. Despite these appellants' [Respondents'] claims, the trustee's [Petitioner's] actions to avoid the transfers, consolidated by the bankruptcy court, were plenary rather than a part of the bankruptcy court's summary proceedings involving the "process of allowance and disallowance of claims."

A-93; *see also* A-90 n.3; A-92 (quoting key distinction stated in *Granfinanciera*).

This reflects the kind of approach adopted by the lower courts in *Granfinanciera* but rejected by this Court in fashioning the no-jury-trial-to-claim-filers rule. Fixing upon the "plenary" versus "summary" nature of a preference proceeding misses a central mark of *Granfinanciera*. When a creditor files a claim against a bankruptcy estate, he invokes the equity jurisdiction of the bankruptcy court by triggering the process of allowing and disallowing bankruptcy claims. If the creditor is then met with a preference action from the trustee, the action itself forms part of that process and so is triable only in equity. Stated differently, the creditor's filed claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*. *See Granfinanciera*, 109 S.Ct. at 2799.

These critical points, disregarded or overlooked by the Tenth Circuit, appear vividly from the undisputed facts here. The Culps and the Dennises sought allowance of their claims by filing their proofs of claim. This occurred before the preference actions were initiated against them. The preference complaints against the Culps and the Dennises as defendants in the bankruptcy court expressly requested the *dis*allowance of their claims against the RTS bankruptcy estate until the preferential monetary amounts were returned by these defendants. A-5, A-9, A-10-11, A-12. The preference actions against Respondents thus formed an inseparable part of the process of allowing and disallowing bankruptcy claims. *Granfinanciera* leaves no doubt that this

process (preference actions included) is triable in equity, *not* to a jury:

> Citing *Schoenthal v. Irving Trust Co., supra*, approvingly, we expressly stated that, if petitioner had not submitted a claim to the bankruptcy court, the trustee could have recovered the preference only by a plenary action, and that petitioner would have been entitled to a jury trial if the trustee had brought a plenary action in federal court. See 382 U.S., at 327-328, 86 S. Ct., at 471-472. We could not have made plainer that our holding in *Schoenthal* retained its vitality: "[A]lthough petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 53 S. Ct. 50, *when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity*." 382 U.S., at 336, 86 S. Ct., at 476.

Granfinanciera, 109 S.Ct. at 2798-99 (emphasis added) (footnote omitted).

This reasoning drives home the distinction that preference defendants who have not filed claims against a bankruptcy estate are entitled to a jury trial on the preference issue, while defendants like Respondents who have filed such claims do not have a Seventh Amendment right to a jury trial. The Tenth Circuit's opinion here has disregarded this key distinction and has incorrectly held that *all* defendants in preference actions are entitled to a jury trial whether or not they have filed claims against a bankruptcy estate and whether or not the preference action

forms part of the process of allowing, disallowing, and adjudicating their claims. Certiorari relief should therefore be granted to remedy this grievous constitutional error.

(II)

The Tenth Circuit's opinion has created an inter-circuit conflict by allowing a jury trial to several preference defendants who themselves filed bankruptcy claims, while other circuits have read *Granfinanciera* as denying a Seventh Amendment jury trial to such defendants.

The Tenth Circuit's opinion has also created a conflict among the circuits on the question whether the Seventh Amendment entitles a preference defendant to a jury trial. In direct conflict with the Tenth Circuit, the two other circuits and all other lower courts facing this question since *Granfinanciera* have steadfastly adhered to this Court's claim-filing distinction. Contrary to the Tenth Circuit's opinion, all other courts have uniformly held that a preference action is triable to a jury only when the preference defendant has not filed a claim against the bankruptcy estate. Claim-filing preference defendants have been denied a jury trial by these other courts. In disregarding this distinction, the Tenth Circuit's opinion collides head on with all of these courts.

The starkest conflict with the Tenth Circuit's opinion here is the Ninth Circuit case of *In re Corey*, 892 F.2d 829 (9th Cir. 1989). The bankruptcy debtor Corey asserted ownership to a commercial property called the Silversword Inn. An entity called the Auna Foundation disputed Corey's ownership and argued that the bankruptcy court had

improperly denied a jury trial to the Foundation on the question of who owned the Silversword Inn. The Foundation itself had lodged no claims against the bankruptcy estate. But the Foundation was under the sole control of a Mr. Ellis and his family who had made claims against the bankruptcy debtor's estate. The Ninth Circuit squarely denied the requested jury trial after applying the claim-filing distinction from *Granfinanciera* which the Tenth Circuit has disregarded here:

> In *Granfinanciera, S.A. v. Nordberg*, ____ U.S. ____, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), the Supreme Court established the limits of the seventh amendment jury right in the context of bankruptcy proceedings. The Court held that the seventh amendment does not protect a creditor's right to jury trial in a bankruptcy proceeding when that creditor has made claims against the debtor's estate. *Id.* 109 S.Ct. at 2799. The Auna Foundation, however, has not itself made a claim against Corey's bankruptcy estate; it merely opposes Corey's effort to establish title to the [Silversword] Inn. . . .
>
> *[T]he Foundation was not, in any event, entitled to a jury trial as it is the controlled instrumentality of an entity that, under Granfinanciera, itself was not entitled to a jury.* The district court found that the Foundation is under the sole control of Ellis and members of his "immediate and controlled family." . . . *Because Ellis and a number of his other controlled entities have made substantial claims against Corey's estate, they would not themselves be entitled to a jury trial.* They lacked the power to change that result by placing the [Silversword] Inn into the hands of a fully controlled instrumentality. We look beyond the form of the transaction and conclude that the Foundation was not entitled to a jury trial.

Corey, 892 F.2d at 836-37 (emphasis added) (footnotes omitted).

The other side of the distinction appears from an Eighth Circuit case, *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990). The circuit court applied the claim-filing rule of *Granfinanciera* to uphold a creditor's right to a jury trial in a preference action because the creditor had not participated in the bankruptcy case and had not filed a claim against the debtor's estate. *Id.* at 1450-51 & n.5.

These circuit court decisions and their reasoning conflict directly with the Tenth Circuit. They uphold *Granfinanciera's* distinction disregarded by the Tenth Circuit's opinion. This inter-circuit conflict strongly calls for certiorari relief by this Court.

Additionally, all federal district courts and bankruptcy courts decided since *Granfinanciera* have uniformly viewed the filing of a claim by a preference defendant as the determinative factor in deciding entitlement to a jury trial. When a defendant has not filed a proof of claim, courts have granted a jury trial. *See In re North Carolina Hospital Ass'n Trust Fund*, 112 B.R. 759, 761-62 (Bankr. E.D.N.C. 1990); *In re Marie Pastor's Morningstar Management, Ltd.*, 109 B.R. 58, 62 (Bankr. S.D.N.Y. 1990); *In re Kroh*

Bros. Development Co., 108 B.R. 710, 712 (Bankr. W.D. Mo. 1989); *In re Industrial Supply Corp.*, 108 B.R. 799, 801-02 (Bankr. M.D. Fla. 1989); *In re Fort Lauderdale Hotel Partners, Ltd.*, 103 B.R. 335, 336 (Bankr. S.D. Fla. 1989).

But when a defendant *has* filed a proof of claim, courts have *denied* a jury trial. *See North Carolina Hospital,* 112 B.R. at 760; *In re Light Foundry Associates*, 112 B.R. 134, 137-38 (Bankr. E.D. Pa. 1990); *In re Wheeling-Pittsburgh Steel Corp.*, 108 B.R. 82, 85 (Bankr. W.D. Pa. 1989); *In re Edwards*, 104 B.R. 890, 893 & n.4 (Bankr. E.D. Tenn. 1989).

The Tenth Circuit's opinion does not mention any of these contrary decisions. Unless corrected, its disregard of *Granfinanciera*'s rule on jury trials will create confusion and uncertainty inside as well as outside the tenth circuit.

RELIEF REQUESTED AND CONCLUSION

Petitioner urges this Court to grant certiorari to correct straightaway the Tenth Circuit's constitutional error, to safeguard the rules of *Granfinanciera, Schoenthal*, and *Katchen*, and to resolve the existing conflict of authority among the circuit courts. Alternatively, Petitioner requests that this Court grant this petition for certiorari, summarily reverse the decision of the Tenth Circuit, and reinstate the decisions of the district and bankruptcy courts which correctly denied a jury trial to Respondents. At the very

least, Petitioner asks this Court to grant certiorari and remand this case to the Tenth Circuit with instructions to reconsider and follow *Granfinanciera*.

Respectfully submitted,

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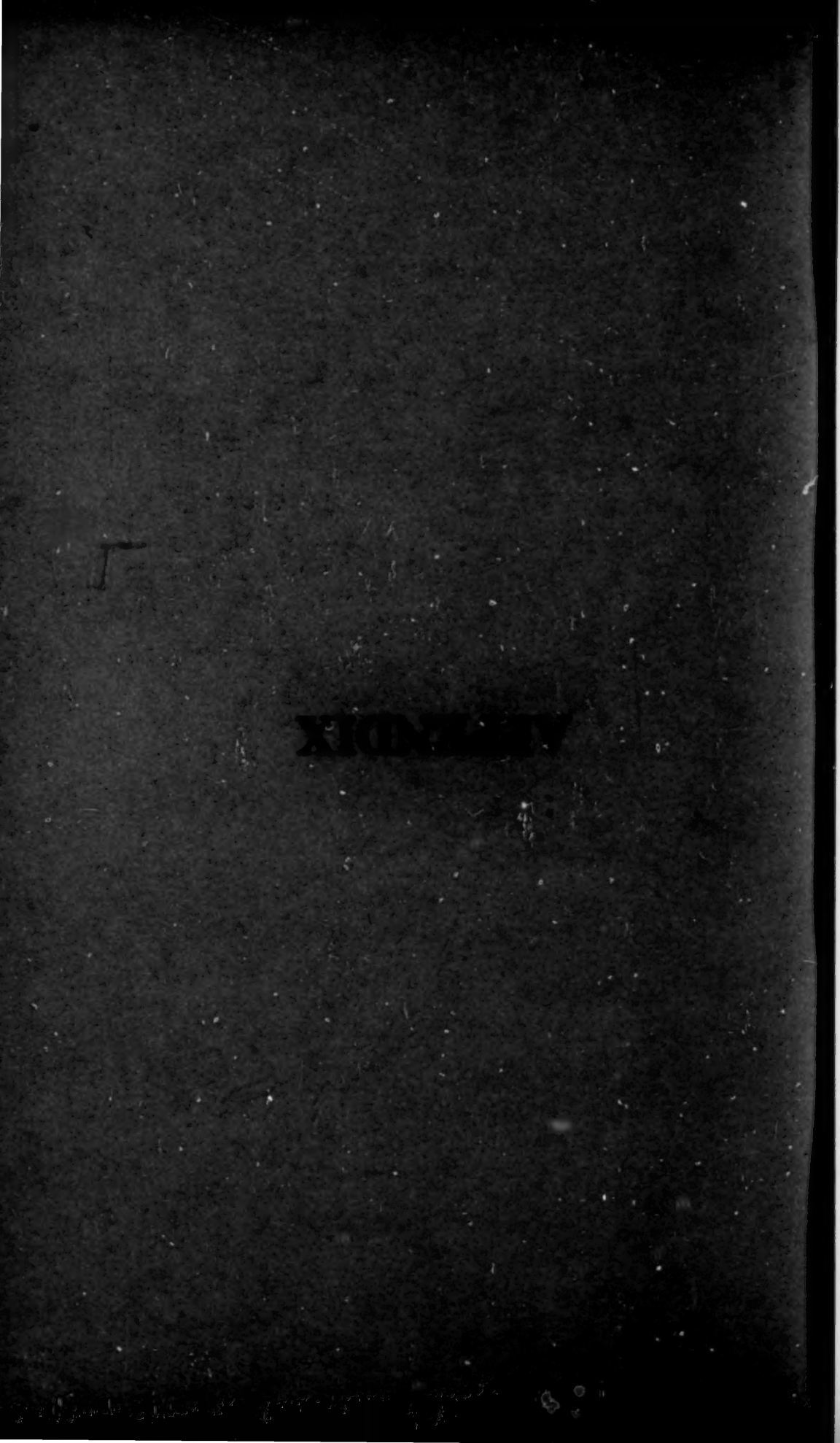

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THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATUTES AND REGULATIONS

Title 11, United States Code (1988)

§ 502. Allowance of claims or interests.

* * *

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

* * *

§ 547. Preferences.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor.

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

* * *

§ 550. Liability of transferee of avoided transfer.

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 84-01461
(Chapter 11)

[File Stamped 9/26/86]

Adversary No. 85-0337

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY
(d/b/a Western Trust and Savings Company),
Debtor.

R. DOBIE LANGENKAMP,
Successor Trustee,
Plaintiff,

vs.

LEROY DENNIS and JANET DENNIS,
Defendants.

FIRST AMENDED COMPLAINT

COMES NOW the Plaintiff, R. Dobie Langenkamp Successor Trustee, and for his causes of action against the above-named Defendants Leroy Dennis and Janet Dennis (hereinafter collectively called the "Defendant", whether one or more), alleges and states as follows:

GENERAL ALLEGATIONS

1. This Court has jurisdiction pursuant to 11 U.S.C. §§ 105, 502(d), 547, 550, 28 U.S.C. §§ 157(a) and (b) and 1334(b) and Referral Rule Misc. No. M-128 in the United States District Court for the Northern District of Oklahoma and is the proper venue, 28 U.S.C. § 1409(a).

2. Plaintiff is the Successor Trustee of the Estate of Republic Trust & Savings Company, (hereinafter referred to as the "Debtor") in the above styled and numbered bankruptcy case.

3. Defendant is, or was during the ninety-day period prior to the filing of the Petition herein, an unsecured creditor of Debtor.

4. The bankruptcy case was filed on September 24, 1984.

COUNT I

5. During the ninety days preceding the filing of the bankruptcy petition, Debtor made the following transfers of its property to or for the benefit of Defendant (hereinafter called the "transfers" whether singular or plural):

Approximate Date	Amount
July 5, 1984	$400,000.00
July 5, 1984	7,000.00

6. The transfers were for or on account of an antecedent debt owed by Debtor to Defendant before such transfers were made.

7. The transfers were made while Debtor was insolvent.

8. The transfers enabled the Defendant to receive more than Defendant would have received if the case were a case under Chapter 7 of the Bankruptcy Code, the transfers had not been made, and the Defendant received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

9. Subsequent to the foregoing transfers, Defendant furnished to Debtor the following new value:

Approximate Date	Amount
August 27, 1984	$ 2,518.34
September 10, 1984	5,200.00
September 21, 1984	1,511.00

10. Pursuant to § 547 of the Bankruptcy Code, the transfers constitute an avoidable transfer in the sum of $397,770.66 and should be avoided.

11. Pursuant to § 550(a) of the Bankruptcy Code, Plaintiff may recover from the Defendant, for the benefit of the Estate, the avoided transfers in the sum of $397,770.66.

COUNT II

12. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

13. In accordance with § 502(d) of the Bankruptcy Code, the unsecured claims of Defendant as set forth in the schedules of unsecured debt filed by Debtor pursuant to § 521(1) of the Bankruptcy Code and the Proof of Claim filed by the Defendant, if any, should be disallowed unless and until the Defendant pays the amount set forth in Paragraph 11 above.

WHEREFORE, Plaintiff prays for judgment against the Defendants Leroy Dennis and Janet Dennis, jointly and severally, in the amount of $397,770.66, for prejudgment interest and postjudgment interest at the rate provided by law, for the costs of this action, and for an Order disallowing Defendant's unsecured claim unless and until said amount is paid, and for such other relief to which the Plaintiff may be entitled.

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By /s/ Richard H. Foster

Sam G. Bratton II
Richard H. Foster
1000 Atlas Life Building
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Plaintiff
R. Dobie Langenkamp,
Successor Trustee

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 26th day of September, 1986, a true and correct copy of the above and foregoing First Amended Complaint was mailed, with proper postage prepaid thereon, to:

Charles B. Lutz, Jr.
800 First City Place
Oklahoma City, OK 73102

/s/ Richard H. Foster
Richard H. Foster

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 84-01461
(Chapter 11)

[File Stamped 3/18/86]

Adversary No. 85-0319

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY
(d/b/a Western Trust and Savings Company),
Debtor.

JACK D. JONES, Trustee,
Plaintiff,

vs.

C. A. CULP, JULIA CULP, and
CULP DISTRIBUTING COMPANY, INC.,
Defendants.

SECOND AMENDED COMPLAINT

COMES NOW the Plaintiff, Jack D. Jones, Trustee, pursuant to Rule of Bankruptcy Procedure No. 7015, and for his causes of action against the above-named Defendants, C. A. CULP, JULIA CULP, and CULP DISTRIBUTING COMPANY, INC. (hereinafter collectively called the "Defendant"), alleges and states as follows:

GENERAL ALLEGATIONS

1. This Court has jurisdiction pursuant to 11 U.S.C. §§ 105, 502(d), 547, 550, 28 U.S.C. §§ 157(a) and (b) and 1334(b) and Referral Rule Misc. No. M-128 in the United

States District Court for the Northern District of Oklahoma and is the proper venue, 28 U.S.C. § 1409(a).

2. Plaintiff is the Trustee of the Estate of Republic Trust & Savings Company, (hereinafter referred to as the "Debtor") in the above styled and numbered bankruptcy case.

3. Defendant is, or was during the ninety-day period prior to the filing of the Petition herein, an unsecured creditor of Debtor.

4. The bankruptcy case was filed on September 24, 1984.

COUNT I

5. During the ninety days preceding the filing of the bankruptcy petition, Debtor made the following transfers of its property to or for the benefit of Defendants C. A. Culp and Julia Culp:

Approximate Date	Amount
August 27, 1984	$18,000.00
September 17, 1984	30,765.27

6. The transfers were for or on account of an antecedent debt owed by Debtor to the Defendants before such transfers were made.

7. The transfers were made while Debtor was insolvent.

8. The transfers enabled the Defendants to receive more than Defendants would have received if the case were a case under Chapter 7 of the Bankruptcy Code, the transfers had not been made, and the Defendants received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

9. Pursuant to § 547 of the Bankruptcy Code, the transfers constitute an avoidable transfer in the sum of $48,765.27, and should be avoided.

10. Pursuant to § 550(a) of the Bankruptcy Code, Plaintiff may recover from the Defendants C. A. Culp and Julia Culp, for the benefit of the Estate, the avoided transfers in the sum of $48,765.27.

COUNT II

11. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

12. In accordance with § 502(d) of the Bankruptcy Code, the unsecured claims of Defendants as set forth in the schedules of unsecured debt filed by Debtor pursuant to § 521(1) of the Bankruptcy Code and the Proof of Claim filed by the Defendants, if any, should be disallowed unless and until the Defendants pay the amount set forth in Paragraph 10 above.

WHEREFORE, Plaintiff prays for judgment against the Defendants C. A. Culp and Julia Culp, jointly and severally, in the amount of $48,765.27, plus prejudgment and postjudgment interest at the rate provided by law, and for an Order disallowing Defendants' unsecured claim unless and until such amount is paid, and for such other relief to which Plaintiff may be entitled.

COUNT III

13. During the ninety days preceding the filing of the bankruptcy petition, Debtor made the following transfers of

its property to or for the benefit of Defendant Culp Distributing Company, Inc.:

Approximate Date	Amount
August 27, 1984	$11,200.59

14. The transfer was for or on account of an antecedent debt owed by Debtor to the Defendant before such transfer was made.

15. The transfer was made while Debtor was insolvent.

16. The transfer enabled the Defendant to receive more than Defendant would have received if the case were a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the Defendant received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

17. Pursuant to § 547 of the Bankruptcy Code, the transfer constitutes an avoidable transfer in the sum of $11,200.59 and should be avoided.

18. Pursuant to § 550(a) of the Bankruptcy Code, Plaintiff may recover from the Defendant Culp Distributing Company, Inc., for the benefit of the Estate, the avoided transfer in the sum of $11,200.59.

COUNT IV

19. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

20. In accordance with § 502(d) of the Bankruptcy Code, the unsecured claim of Defendant as set forth in the schedules of unsecured debt filed by Debtor pursuant to § 521(1) of the Bankruptcy Code and the Proof of Claim

filed by the Defendant, if any, should be disallowed unless and until the Defendant pays the amount set forth in Paragraph 18 above.

WHEREFORE, Plaintiff prays for judgment against the Defendant Culp Distributing Company, Inc. in the amount of $11,200.59, plus prejudgment and postjudgment interest at the rate provided by law, and for an Order disallowing Defendant's unsecured claim unless and until said amount is paid, and for such other relief to which the Plaintiff may be entitled.

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By /s/ Richard H. Foster

Sam G. Bratton II
Richard H. Foster
1000 Atlas Life Building
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Plaintiff
Jack D. Jones, Trustee

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 18th day of March, 1986, a true and correct copy of the above and foregoing Second Amended Complaint was mailed, with proper postage prepaid thereon, to: James M. Little, P. O. Box 26568, Oklahoma City, Oklahoma 73126.

/s/ Richard H. Foster
Richard H. Foster

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 84-01461
(Chapter 11)

[File Stamped 3/4/86]

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY
(d/b/a Western Trust and Savings Company),
an Oklahoma trust company,
Debtor.

ORDER DISALLOWING CLAIMS OF PREFERENCE DEFENDANTS FOR THE PURPOSES OF VOTING

The trustee has brought his motion to reconcile the claims of the below-mentioned defendants in accordance with schedules attached to said motion. The trustee moves the Court to disallow the below-mentioned claims for the reason that said claimants are also defendants in adversary proceedings wherein the trustee seeks to recover the value of preferential transfers and said trustee has in fact commenced adversary proceedings. Said adversary proceedings also seek to disallow the claims of the defendants in accordance with § 502(d) of the Bankruptcy Code and thus the Court is faced with this motion to invoke the provisions of § 502(d) and also with the same provision as a parcel of the adversary proceeding.

Considerable weight has been given to construction of 502(d) to the effect that a claim of a preference defendant should not be allowed or disallowed until the conclusion of said adversary proceeding. The Court agrees with this construction of said statute insofar as the same applies to

distribution under the plan of reorganization or on account of a trustee.

One must give credence to the import of § 502(c) and (d) to effect the intent of said statutes. Section 502(c) mandates the Court to estimate for the purposes of allowance contingent and unliquidated claims; and section 502(d) mandates the Court to disallow a claim of an entity from which property is recoverable if there is a transfer avoidable under the trustee's avoiding powers. An important factor is the expeditious determination of claims for purposes of allowance. When a claim should be allowed or disallowed by virtue of pending adversary proceedings, the Court should not be required to hold up the expeditious administration of said estate until said allowance is determined. In the case at bar, a most complicated matter concerning thousands of claimants, the Court is aware of the approval of the trustee's disclosure statement, disclosing contents of the plan and has set a time to hear the confirmation of said plan which, of course, must be voted on by the creditors. The hearing on confirmation of the plan should not be continued until all claims are allowed or disallowed for all purposes for if that would be the case, ofttimes, hearings on confirmations could not be held for numbers of years and implementation of a plan benefiting creditors would be withheld pending completion of those matters. Accordingly, the Court finds that the claimants who are subject to preferential transfers are in fact subject to the provision of § 502(d) and their claim should be disallowed for the purposes of voting and the determination as to the allowance of the same should be determined in said adversary proceeding.

IT IS THEREFORE ORDERED that the following claims are disallowed for the purposes of voting on the plan of reorganization presently pending and that allowance of said claims for purposes of distribution is continued until final determination of the presently pending adversary proceeding, said claimants being as follows:

Akin, Laurie
Anderson, Paul W., Jr.
Bertalot, Carolyn
Bertalot, 0. J.
Cagle, Larry L.
Culp, C. A.
Dennis, Leroy
Ferguson, James
Frits, Louis
Harrold, Tom W.
Hope, Wilma
McKinney, Wesley R.
Roederer, Jean P.
Western World Properties
Western World Resort
Wysatt, William

Dated: March 4, 1986.

/s/ Mickey D. Wilson
UNITED STATES BANKRUPTCY JUDGE

c: Sam G. Bratton, II
Warren L. McConnico
Akin, Laurie
Anderson, Paul W., Jr.
Bertalot, Carolyn
Bertalot, 0. J.
Cagle, Larry L.

Culp, C. A.
Dennis, Leroy
Ferguson, James
Frits, Louis
Harrold, Tom W.
Hope, Wilma
McKinney, Wesley R.
Roederer, Jean P.
Western World Properties
Western World Resort
Wyatt, William

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 84-01461
(Chapter 11)

[File Stamped 2/26/87]

Adversary No. 85-0337
(McFEELEY)

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY
an Oklahoma corporation,
Debtor.

R. DOBIE LANGENKAMP,
Successor Trustee,
Plaintiff,

vs.

LEROY DENNIS and JANET DENNIS,
Defendants.

ORDER DENYING JURY DEMAND

This matter came before the Court upon the jury trial demand of defendants LeRoy Dennis and Janet Dennis. The successor trustee, R. Dobie Langenkamp ("Trustee"), opposes this demand stating that defendants are not entitled to a jury trial in a proceeding under § 547 of the Bankruptcy Code. This Court agrees with the view of the trustee.

Pursuant to 28 U.S.C. § 175(b)(2)(F), this proceeding seeking "to determine, avoid, or recover preferences" is a core proceeding. Therefore, this Court may enter a final judgment in the action and may decide whether there is a

right to a jury. *In re Reda, Inc.*, 60 B.R. 178 (Bankr. N.D. Ill. 1986); *In re Rodgers & Sons, Inc.*, 48 B.R. 683, 688 (Bankr. E.D. Okla. 1985).

The preference action which is the subject of this adversary proceeding is strictly a creature of § 547. "[T]here was no right at common law for a debtor or creditor to sue to recover a preference." *Reda*, 60 B.R. at 180. Therefore, applying the Seventh Amendment standard for determining whether the right to a jury trial exists, "there obviously was no common law right to a jury trial in actions to avoid preferential transfers." *Id.* Further, there is no statutory right to a jury trial in a preference action. Nor is a preference action one seeking money damages such that the right to a jury trial exists. *Id.; see also, Rodgers & Sons*, 48 B.R. at 689. Therefore, it is the view of this Court, in keeping with the majority ruling of courts faced with this issue, *see Reda*, 60 B.R. 178 and cases cited therein, that the right to a jury trial does not exist in this preference action.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the jury trial demand of the Dennis is denied.

Done this 23rd day of February, 1987.

/s/ Mark B. McFeeley
MARK B. McFEELEY
United States Bankruptcy Judge
Sitting By Designation

I certify that on 2/26/87 I mailed a copy of the above to:

Sam G. Bratton II
Attorney for Plaintiff
1000 Atlas Life Building
Tulsa, OK 74103
(918-582-1211)

Anita Mooreman
Attorney for Defendants
800 First City Place
Oklahoma City, OK 73102

/s/ Sandra L. Jackson
Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 84-01461
(Chapter 11)

[File Stamped 2/26/87]

Adversary No. 85-0337
(McFEELEY)

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY
an Oklahoma corporation,
Debtor.

R. DOBIE LANGENKAMP,
Successor Trustee,
Plaintiff,

vs.

C. A. CULP and JULIA CULP,
Defendants.

ORDER DENYING JURY DEMAND

This matter came before the Court upon the jury trial demand of defendants C. A. Culp and Julia Culp. The successor trustee, R. Dobie Langenkamp ("Trustee"), opposes this demand stating that defendants are not entitled to a jury trial in a proceeding under § 547 of the Bankruptcy Code. This Court agrees with the view of the trustee.

Pursuant to 28 U.S.C. § 175(b)(2)(F), this proceeding seeking "to determine, avoid, or recover preferences" is a core proceeding. Therefore, this Court may enter a final judgment in the action and may decide whether there is a

right to a jury. In re Reda, Inc., 60 B.R. 178 (Bankr. N.D. Ill. 1986); In re Rodgers & Sons, Inc., 48 B.R. 683, 688 (Bankr. E.D. Okla. 1985).

The preference action which is the subject of this adversary proceeding is strictly a creature of § 547. "[T]here was no right at common law for a debtor or creditor to sue to recover a preference." Reda, 60 B.R. at 180. Therefore, applying the Seventh Amendment standard for determining whether the right to a jury trial exists, "there obviously was no common law right to a jury trial in actions to avoid preferential transfers." Id. Further, there is no statutory right to a jury trial in a preference action. Nor is a preference action one seeking money damages such that the right to a jury trial exists. Id.; see also, Rodgers & Sons, 48 B.R. at 689. Therefore, it is the view of this Court, in keeping with the majority ruling of courts faced with this issue, see Reda, 60 B.R. 178 and cases cited therein, that the right to a jury trial does not exist in this preference action.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the jury trial demand of the Dennis is denied.

Done this 23rd day of February, 1987.

/s/ Mark B. McFeeley
MARK B. McFEELEY
United States Bankruptcy Judge
Sitting By Designation

I certify that on 2/26/87 I mailed a copy of the above to:

Sam G. Bratton II
Attorney for Plaintiff
1000 Atlas Life Building
Tulsa, OK 74103
(918-582-1211)

Anita Mooreman
Attorney for Defendants
800 First City Place
Oklahoma City, OK 73102

/s/ Sandra L. Jackson
Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 84-01461
(Chapter 11)

Civil Proceeding No. 85-0337

[File Stamped 5/6/87]

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY
(dba Western Trust and Savings Company),
Debtor.

R. DOBIE LANGENKAMP,
Successor Trustee,
Plaintiff,

vs.

LEROY DENNIS and JANET DENNIS,
Defendants.

MEMORANDUM OPINION

This matter comes before the Court on defendants' motion for summary judgment. For the reasons set forth herein, defendants' motion will be denied. Prior to its commencing this chapter 11 case, the debtor, Republic Trust & Savings Company ("RTS" or "Republic Trust"), was engaged in the business of receiving deposits, issuing thrift certificates and loaning money. On January 7, 1984, the defendants purchased a thrift certificate in the amount of $430,312.41 from Republic Trust. On July 5, 1984, the date of the certificate's maturity, the defendants redeemed

their certificate in the amount of $407,000.00.[1] On that date, the defendants purchased a new certificate in the amount of $39,329.59.

The debtor filed its chapter 11 petition on September 24, 1984. On October 3, 1984, the defendants filed their proof of claim in the amount of $81,111.66. On October 23, 1985, the trustee filed this adversary proceeding to recover preferential transfers made to these defendants. Upon the trustee's motion, the Court disallowed the defendants' claim for the purpose of voting, pursuant to § 502(d) of the Code,[2] and continued the objection to allowance of the claim for the purpose of distribution pending a final determination of this adversary proceeding. Although they were listed on the mailing certificate, defendants claim they did not receive notice of the confirmation hearing on the debtor's plan of reorganization, nor did they receive notice of the time in which to file acceptances or rejections of the plan or notice of the time in which to object to the plan. Finally, the defendants claim that they did not receive a ballot by which to vote on the

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[1]The defendants requested RTS to issue two checks--one in the amount of $7,000.00 to be used to pay taxes, and another in the amount of $400,000.00 which was to be reinvested.

[2]Section 502(d) of the Code provides in pertinent part:

> Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity . . . that is a transferee of a transfer avoidable under section . . . 547 . . . of this title, unless such entity or such transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section . . . 550 . . . of this title.

plan, nor did they receive a copy of the order confirming the plan.

The defendants argue they are entitled to summary judgment for the following reasons: (l) Since the defendants were denied their procedural due process rights, they are not subject to the confirmed plan and should not be required to share in a percentage distribution; (2) The Bankruptcy Amendments of 1984 are applicable to this adversary proceeding; and (3) The payment to the defendants satisfies the ordinary course of business exception in § 547(c)(2).

In *Langenkamp v. Saied (In re Republic Financial Corp.)*, No. 85-0302 (Bkrtcy. N.D. Okla. April 9, 1987),' this Court resolved issues similar, if not identical, to those raised by the defendants herein. The Court determined in that proceeding that if the defendants' due process rights were violated, their remedy is to pursue a nondischargeable claim under the analysis of the Tenth Circuit Court of Appeals in *Reliable Electric Co., Inc. v. Olson Construction Co.*, 762 F.2d 620 (1984). We stated in *Saied*:

> [T]his Court need not rule on the merits of the alleged due process violation. Even if the defendants could establish that appropriate due process was not accorded them vis-a-vis confirmation of the debtor's plan of reorganization, that would not entitle them to summary judgment in a preference action brought by the trustee pursuant to his avoiding powers. It may well be that if these parties did not receive notice of this bankruptcy or the hearing on confirmation in time to allow them to object to the plan, they may not be bound by the provisions of that plan and its putative effect on their property rights. They may also have a nondischargeable claim against the

> estate. *See, Reliable Electric Co., Inc. v. Olson Construction Co.*, 762 F.2d 620 (10th Cir. 1984); *New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953); *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94, 99 (1st Cir. 1974); *In re Harbor Tank Storage Co., Inc.*, 385 F.2d 111, 115 (3d Cir. 1967). However, the trustee did not bring this action pursuant to any provision of the plan to which these defendants arguably may not be bound. Rather, this action was commenced pursuant to the trustee's avoiding powers found in §§ 547 and 550 of the Bankruptcy Code. There is no allegation that the defendants did not receive proper service of this adversary proceeding. That is all due process requires in this context. Therefore, this Court finds that defendants' potential claim for nondischargeability is not properly brought as a defense to a preference lawsuit, and defendants are not entitled to any setoff herein.

Memorandum opinion, pp. 8-9. The defendants in this case are similarly situated to the Saieds. The facts giving rise to the claimed due process violations are somewhat different, but the defendants' remedies are the same. If the defendants believe they are not bound by the plan (or that they "are not required to share in a percentage distribution"), they can take appropriate legal action to pursue their nondischargeability claim. Their claims do not create an affirmative defense to this preference action, however. Ample due process herein was effectuated by proper service of the summons and complaint.

This Court also ruled in the *Saied* case that the 1984 amendment to § 547(c)(2)--eliminating the 45 day limit to the "ordinary course of business" exception--was not

applicable to adversary proceedings filed after October 8, 1984 but which relate to bankruptcy cases which were pending on that date. This Court there reasoned:

> There is nothing much clearer in the Code than the dichotomy which it creates between "cases" and "civil proceedings." The jurisdictional provisions, found in 28 U.S.C. 1334, which was added by the 1984 Amendments, provide for "original and exclusive jurisdiction of all *cases* under title 11," and "original but not exclusive jurisdiction of all *civil proceedings* arising under title 11, or arising in or related to cases under title 11." (emphasis supplied.) It is clear that the present action is a "civil proceeding arising under title 11" and not a "case" under title 11. This congressional distinction is further demonstrated in the venue provisions of title 28 relating to bankruptcy. Section 1408 refers to "a case" and section 1409 governs the filing of "a proceeding." The context and provisions of these sections make it apparent that a "civil proceeding" is not "a case." *See also*, 28 U. S. C. § 1412 (district court may transfer "case *or* proceeding"); 28 U.S.C. § 157(a) (district court may refer any or all "cases" or "proceedings"); 1 COLLIER ON BANKRUPTCY 3.01[1] [c] [i] at 3-20 (L. King 15th ed. 1987) ("It is quite apparent that "cases" under title 11 are to be distinguished from civil proceedings arising under title 11 . . .").

However, the defendants argue that the Code and its 1984 Amendments refer consistently to "cases under title 11" and not simply to "cases" and since § 553(a) of the 1984 Amendments speaks of simply "cases" without expressing a clear context, Congress must have intended to use that term in a generic sense -- including both cases and proceedings. We believe that such a distinction is not well taken. If Congress had meant to include both "cases and proceedings" in § 553(a), it could have so stated. It did not. Moreover, we cannot ignore the well-established distinction between cases and proceedings which is part and parcel of the Bankruptcy Code. This Court finds no ambiguity or "imprecision and lapsing into bankruptcy jargon" in § 553(a) of the 1984 Amendments.

Moreover, to interpret § 553(a) of the 1984 Amendments as the defendants urge us, would require the Court to conclude that the results in two preference actions filed in the same bankruptcy proceeding, similar in all respects would be determined by the application of different legal standards because of a trustee's decision to file the complaints on separate dates. This Court refuses to draw such an illogical conclusion.

Langenkamp v. Saied (In re Republic Financial Corp.), No. 85-0302, memorandum opinion, pp. 4-5 (Bkrtcy. N.D. Okla, April 9, 1987).

The final issue left for resolution is the defendants' claim that the payment by RTS to them satisfies the ordinary course of business exception found in 547(c)(2).[3]

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[3]Section 547(c) (2) of the Code, prior to the 1984 amendments, provided as follows:

> The trustee may not avoid under this section a transfer--
>
> (2) to the extent that such transfer was--
>
> (A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made not later than 45 days after such debt was incurred;
>
> (C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

In order to establish a defense under this section, the defendants must demonstrate the following:

> (l) The debt was incurred in the ordinary course of business or financial affairs of the debtor;
>
> (2) The debt was incurred in the ordinary course of business or financial affairs of the transferee;
>
> (3) The transfer was made not later than 45 days after the debt was incurred;
>
> (4) The transfer was made in the ordinary course of business or financial affairs of the debtor;
>
> (5) The transfer was made in the ordinary course of business or financial affairs of the transferee; and
>
> (6) The transfer was made according to ordinary business terms.

The defendants are unable to establish this defense in the present case because of the third element--this transfer was made more than 45 days after the debt was incurred. In the present case, the debt to the defendants was incurred on January 7, 1984, when the debtor issued the thrift certificate. *See, Barash v. Public Finance Corporation*, 658 F.2d 504, 509-11 (7th Cir. 1981); *In re Western World Funding, Inc.*, 54 B.R. 470, 480 (Bkrtcy. D. Nev. 1985); *In re Property Leasing & Management, Inc.*, 46 B.R. 903, 913-14 (Bkrtcy. E.D. Tenn. 1985); *In re Head*, 26 B.R. 578, 580 (Bkrtcy. M.D. Fla. 1983); *In re McCormick*, 5 B.R. 726, 730 (Bkrtcy. N.D. Ohio 1980). The transfer back to the defendants occurred six months later on the

---

(D) made according to ordinary business terms.

certificate's maturity date--clearly beyond the 45 day limit. Therefore, the Court finds this transfer is not within the purview of the "ordinary course of business" exception of § 547(c)(2).

CONCLUSION

In conclusion, having held that the alleged due process violation is not an appropriate defense to the preference action, that the 1984 amendments are inapplicable, and that the transfer at issue is clearly outside the 45 day period set forth in §547(c)(2), the Court finds that the defendants are not entitled to summary judgment in their favor.

This memorandum opinion shall constitute findings of fact and conclusions of law, pursuant to Bankruptcy Rule 7052. An appropriate order shall enter.

DATED this 1 day of May, 1987.

BY THE COURT:

/s/ Glen E. Clark
GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

This is to certify that a copy of the memorandum opinion was mailed to the following this 6th day of May, 1987.

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/s/ Sandra L. Jackson
Deputy Clerk
United States Bankruptcy Court
for the District of Oklahoma

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 84C-01461
Chapter 11

[File Stamped 7/6/87]

Adversary No. 85-0337

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY,
d/b/a Western Trust and Savings Company,
Debtor.

R. DOBIE LANGENKAMP,
Successor Trustee,
Plaintiff,

vs.

LEROY DENNIS and JANET DENNIS,
Defendants.

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

This matter came on for trial before the Court on June 1, 1987. The plaintiff was represented by Sam G. Bratton, II, John J. Carwile, and Richard H. Foster, of Doerner, Stuart, Saunders, Daniel & Anderson, Tulsa, Oklahoma; defendants were represented by Charles B. Lutz, Jr. and Anita M. Moorman, of Speck, Philbin, Fleig, Trudgeon & Lutz, of Oklahoma City, Oklahoma. Trial was concluded on June 5, 1987, at which time the Court took this matter under advisement.

The Court, now having duly considered the evidence presented to it, together with the memoranda and arguments of counsel, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is the successor trustee of the estate of Republic Trust & Savings Company, d/b/a Western Trust & Savings Company (hereinafter "RTS"), the debtor in the above-entitled bankruptcy proceeding.

2. This chapter 11 bankruptcy proceeding was commenced on September 24, 1984.

3. Jack D. Jones was appointed trustee in the case on October 31, 1984.

4. R. Dobie Langenkamp was appointed successor trustee in the case on May 9, 1986, effective May 16, 1986.

5. RTS was an uninsured financial institution, principally engaged in the business of issuing evidence of debt and the making of commercial and personal loans, both secured and unsecured.

6. On or about January 7, 1984, in exchange for cash or other valuable consideration from the defendants worth $430,312.41, RTS issued to the defendants that certain thrift certificate number 9004360, dated January 7, 1984, in the principal amount of $430,312.41.

7. During the 90-day period before the date of filing of the bankruptcy petition herein, RTS made the following transfers of property to or for the benefit of the defendants (hereinafter collectively called "transfers"), to-wit:

Date	Amount
July 5, 1984	$400,000.00
July 5, 1984	$ 7,000.00

8. The foregoing transfers were made through the following checks from RTS, to-wit:

Date	Check No.	Amount of Check
July 5, 1984	15797	$400,000.00
July 5, 1984	15798	$ 7,000.00

9. The foregoing checks were drawn against RTS's operating account with First City Bank, of Oklahoma City, Oklahoma.

10. Defendant Leroy Dennis received both of the foregoing checks from RTS.

11. Defendant Leroy Dennis endorsed and negotiated both of the foregoing checks.

12. The foregoing checks were honored by First City Bank.

13. The foregoing checks were made in payment of some of RTS's obligations to the defendants under RTS thrift certificate number 9004360. On July 5, 1984, as part of the same transaction, RTS issued to the defendants that RTS thrift certificate number 9006366, dated July 5, 1984, in the principal amount of $39,329.59.

14. Defendants were the initial transferees of the foregoing transfers and the entities for whose benefit such transfers were made.

15. During the 90-day period prior to September 24, 1984, defendants furnished to RTS the following new value, to-wit:

Date	Amount
August 27, 1984	$ 2,518.34
September 10, 1984	$ 5,200.00
September 21, 1984	$ 1,511.00

16. The principal asset of RTS was its loan portfolio.

17. The liabilities of RTS consisted primarily of its obligations to purchasers of its thrift certificates and passbook thrift certificates.

18. RTS was primarily a collateral lender.

19. Prior to September 24, 1984, RTS routinely engaged in unsafe and unsound lending practices. These practices included:

(a) RTS did not properly evaluate loan requests in terms of credit history, character, capacity to repay, collateral value, or adequacy of capital or net worth;

(b) RTS did not evaluate loan requests with respect to the effects of worsening economic conditions;

(c) RTS and its borrowers did not agree upon a loan repayment program at the time of loan origination;

(d) RTS made loans that did not provide for periodic payments;

(e) RTS made and reviewed loans without adequate collateral appraisals or title searches;

(f) RTS deferred and extended loans without full payment of interest and reduction of principal;

(g) RTS made an inordinate number of loans to officers and directors, their relatives and other corporations or entities controlled by them, wholly

without adequate security for the loans or other reasonable prospects for repayment;

(h) RTS failed to recognize or establish adequate loan loss reserves against nonperforming or poor quality loans;

(i) RTS intentionally misrepresented the quality or character of nonperforming or low quality loans and took affirmative actions to disguise the true quality of such loans.

20. On June 29, 1984, through a corporate reorganization referred to as "the divestiture," ownership of RTS was transferred from its parent corporation, Republic Bancorporation, Inc. ("Old RBI") to a newly formed parent corporation, also known as Republic-bancorporation, Inc. ("New RBI"). Prior to the divestiture, Old RBI was indebted to RTS in the amount of $1.5 million. In the divestiture transaction, this debt was transferred to New RBI. As a result of the divestiture, RTS encountered significant and devastating liquidity problems, and the divestiture seriously impaired RTS's ability to raise capital.

21. The general ledger balance sheets for RTS show the loan to RBI of $1.5 million to either Old RBI or New RBI as an asset for every day during the period between June 25, 1984 and September 24, 1984.

22. On the date of the transfers, and at all times during the 90-day period before bankruptcy, New RBI was completely unable to repay the $1.5 million loan, and the fair value of this loan was zero.

23. Between July 18, 1984 and September 24, 1984, Republic Financial Corporation ("RFC") sold to RTS 259 loans, in the total principal amount of $9,122,666.25. As of

July 30, 1984, RFC had sold only two of such loans to RTS, in the total principal amount of $77,112.38.

24. The debtor's schedules list property owned by the debtor of $35,281,332.86 and debts of $37,555,733.26, as of September 24, 1984, the date of the filing of RTS's petition.

25. Harold J. Madigan, an independent loan portfolio expert, rendered an opinion that on June 25, 1984, RTS's loan portfolio was overvalued in the amount of at least $4,292,806.00, and he further rendered an opinion that a write-down or reserve against these loans in this amount was appropriate. A write-down or reserve against these loans in the amount of the overvaluation would render RTS insolvent on June 25, 1984.

26. Richard Spillers, of Touche, Ross & Co., retained by the trustee, rendered an opinion that on June 25, 1984, RTS's assets were overvalued in the amount of at least $4,259,000.00. Spillers further rendered an opinion that a write-down or reserve against the assets of RTS in the amount of the overvaluation would render RTS insolvent on June 25, 1984.

27. Touche, Ross & Co. reviewed the debtor's financial statements for each of the 90 days next preceding the filing of the debtor's petition and was of the opinion that RTS was insolvent on each such date.

28. There were no developments from June 25, 1984 to September 24, 1984 that improved the financial condition of RTS.

29. The affirmative evidence offered by defendants to support their claim of solvency consisted of the testimony of Ansil L. Ludwick, former president of RTS, the testimony

of Paul Anderson, former vice chairman of RTS, the Report of Examination of the Oklahoma Banking Department (effective as of the close of business on July 30, 1984), the opinion of the deputy commissioner of the Oklahoma Department of Banking, and the unaudited daily general ledger balance sheets for RTS prepared during the 90-day period prior to September 24, 1984.

30. From June 25, 1984 to September 24, 1984 the loan portfolio asset values shown on the RTS general ledger balance sheets were overstated.

31. The general ledger balance sheets of RTS are unreliable evidence of RTS's financial condition or its asset value from June 25, 1984 to September 24, 1984.

32. The testimony of Ansil L. Ludwick and Paul Anderson that RTS was solvent from June 25, 1984 to September 24, 1984 is not credible and is contradicted by the evidence introduced by the plaintiff.

33. The RTS estate's lawsuit against Aetna Casualty and Surety Company ("Aetna") is a contingent, inchoate, and speculative claim, and cannot be rendered available for payment of the RTS estate's debts within a reasonable period of time. The Court finds that this cause of action is an asset of the estate. However, in light of the nature of the claim and the evidence before the Court, for the purposes of the test for insolvency under § 547(b)(3) and the test for greater recovery under § 547(b)(5), the Court finds the value of this asset to be zero.

34. There is no evidence of the existence of any claims or causes of action, other than collections, that could be rendered available for payment of the RTS estate's debts within a reasonable period of time.

35. Subsequent to July 30, 1984, the Oklahoma Banking Department ("Department") issued its Report of Examination ("Report") for RTS, such Report being effective as of the close of business on July 30, 1984.

36. The Department's Report showed RTS having an adjusted equity capital and reserves of $342,000.00 on July 30, 1984. The Department's Report further reflected that RTS owned $10,834,000.00 in assets classified as "substandard" by the Department, $81,000.00 in assets classified as "doubtful" by the Department, and $3,297,000.00 in assets classified as "loss" by the Department. In computing the $342,000.00 adjusted equity capital and reserves, the Department wrote off all the $3,297,000.00 of "loss" assets, wrote down 50 percent of the amount of "doubtful" assets, and wrote down no portion of the $10,834,000.00 in "substandard" assets.

37. The fair value of RTS's substandard loans was approximately 90 percent of the $8,302,000.00 book value of such substandard assets. In computing RTS's $342,000.00 in adjusted equity capital and reserves, the Department did not take into account the $8,302,000.00 difference between the fair value and book value of the substandard loans. Taking into account such $830,200.00 difference, the Department's adjusted equity capital and reserves would be a negative $488,000.00.

38. In the Department's Report, the Department did not adversely classify as substandard, doubtful, or loss the specific loans listed hereinbelow. Additionally, in the Department's computation of the $342,000.00 in adjusted equity capital and reserves, the Department did not take into account the differences between the fair values and book values of such specific loans, to-wit:

Name of Borrower	Principal Balance In June 1984	Necessary Reserve In June 1984 For Loan Loss	Adjusted Value Of Loan On June 25, 1984
Ask, Inc.	$ 66,679.00	$ 33,000.00	$33,679.00
Geno's Steak House	$ 47,827.00	$ 47,827.00	-0-
Geno's Steak House	$ 76,654.00	$ 76,654.00	-0-
Ira Crews	$115,000.00	$ 96,000.00	$ 20,000.00
Ira Crews	$ 88,000.00	$ 99,000.00	-0-
Ira Crews	$765,728.00	$447,000.00	$318,728.00
Stanton Nelson	$144,393.00	$ 28,000.00	$116,393.00
HMC Resources Corp.	$ 86,810.00	$ 86,810.00	-0-
SkyFlite, Inc.	$276,686.00	$200,000.00	$ 76,686.00
Timbercrest Co., Inc.	$ 55,885.00	$ 55,885.00	-0-
Western World Properties, Inc.	$ 99,790.00	$ 99,790.00	-0-
Western World Properties Inc.	$100,000.00	$100,000.00	-0-
John R. Cain	$ 19,000.00	$ 19,000.00	-0-

Continued from Previous Page

Name of Borrower	Principal Balance In June 1984	Necessary Reserve In June 1984 For Loan Loss	Adjusted Value Of Loan On June 25, 1984
John R. Cain	$ 13,858.00	$ 13,858.00	-0-
John R. Cain	$ 12,000.00	$ 12,000.00	-0-
Campus East Development	$116,000.00	$ 53,000.00	$63,000.00
Total	$2,084,310.00	$1,467,824.00	$615,486.00

39. On June 25, 1984, the fair value of RTS's debts exceeded the fair value of its assets.

40. On each and every day in the period from June 25, 1984 to September 24, 1984, and including the date of the transfers at issue, the sum of RTS's debts exceeded the fair value of its assets.

41. The Court finds that the evidence establishing the debtor's insolvency on the date of the filing of the bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under chapter 7 of the Bankruptcy Code, the transfers had not been made, and the defendants received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

42. The transfers at issue enabled the defendants to receive more than they would have received if the case were a case under chapter 7 of the Bankruptcy Code, the transfers had not been made, and the defendants received payment of

the debt to them to the extent provided by the provisions of the Bankruptcy Code.

43. The transfers were in payment of a debt incurred in the ordinary course of business or financial affairs of RTS.

44. The transfers were made in the ordinary course of business or financial affairs of RTS.

45. The transfers were made according to ordinary business terms.

46. The transfers were made in payment of a debt incurred in the ordinary course of business or financial affairs of the defendants.

47. The transfers were made in the ordinary course of business or financial affairs of the defendants.

48. Defendants have failed to establish by clear and convincing evidence that RTS obtained any funds from defendants through false, fraudulent, or misleading representations or statements of material fact. Defendants further have failed to establish by clear and convincing evidence that they reasonably relied on any false, fraudulent, or misleading misrepresentations in purchasing certificates. Defendants further have failed to establish by clear and convincing evidence that they were fraudulently induced to purchase any certificates.

49. RTS routinely and regularly commingled all funds received through the sale of its thrift certificates or passbook savings certificates, in operating accounts with Sunbelt Bank and Trust, of Tulsa, Oklahoma, and First City Bank, Oklahoma City, Oklahoma. Defendants have failed to

introduce any evidence showing that they can trace the funds paid to RTS for the purchase of any certificates.

50. The defendants have failed to establish that the postpetition conduct of the trustee, successor trustee, or their agents was improper, or grossly inequitable. To the contrary, this Court specifically notes as follows:

> (a) After a hearing held on March 21, 1986, and in its order dated March 21, 1986 in the RTS case, this Court finds that notice and confirmation of the RTS plan of reorganization was proper in all respects and was approved;
>
> (b) After a hearing held on October 8, 1986, and in its order of October 15, 1986, this Court affirmed and approved the successor trustee's abandonment of, and decision to not pursue preference claims of less than $5,000.00 and to not seek to avoid or recover transfers of funds between RTS and RFC; and
>
> (c) After a hearing on September 23, 1985, and in its order dated December 4, 1985, entered in both the RTS and RFC bankruptcy cases, this Court approved the omnibus settlement agreement between the RTS and RFC estates.

CONCLUSIONS OF LAW

1. RTS is qualified to be a debtor under 11 U.S.C. § 109 and this Court has jurisdiction over the subject matter of this adversary proceeding. *See* order entered January 19, 1986 in *In re Republic Financial Corp.*, case number 84-01460, in the United States Bankruptcy Court for the Northern District of Oklahoma, *and In re Republic Trust & Savings Company*, 59 B.R. 606 (Bkrtcy. N.D. Okla. 1986); *affirmed by* order entered March 19, 1987 in the United

States District Court for the Northern District of Oklahoma, case numbers 86-C-77-B and 86-C-312-B (consolidated).

2. The RTS bankruptcy case was commenced prior to October 8, 1984, and the 1984 Amendments to Section 547 of the Bankruptcy Code are not applicable to this adversary proceeding. Memorandum opinion dated May 1, 1987, in *R. Dobie Langenkamp v. Dennis*, adversary number 85-0337, United States Bankruptcy Court for the Northern District of Oklahoma.

3. The defendants have no right to a trial by jury of this adversary proceeding. Order dated May 1, 1987, *R. Dobie Langenkamp v. Dennis*, adversary number 85-0337, United States Bankruptcy Court for the Northern District of Oklahoma.

4. The defendants were, by virtue of the foregoing thrift certificate, creditors of RTS. *In re Republic Trust & Savings Company*, 59 B.R. at 613.

5. The foregoing transfers were made for or on account of antecedent debts owed by RTS to the defendants under the foregoing thrift certificate before such transfers were made.

6. The transfers were made more than 45 days after the debt under RTS thrift certificate number 9004360 was incurred.

7. The defendants' July 5, 1984 renewal in part of a prior thrift certificate is the substitution of a new obligation for an existing obligation and therefore does not constitute new value. 11 U.S.C. § 547(a)(2); *In re F&S Central Mfg. Corp.*, 53 B.R. 842, 849-50 (Bkrtcy. E.D.N.Y. 1985).

8. The principal debt under the RTS thrift certificate was incurred upon the issuance of such thrift certificate. *See* memorandum opinion dated May 1, 1987, in *R. Dobie Langenkamp vs. Dennis*, adversary number 85-0337, in the United States Bankruptcy Court for the Northern District of Oklahoma; *Barash v. Public Finance Corporation*, 658 F.2d 504, 509-511 (7th Cir. 1981); *In re Property Leasing & Management, Inc.*, 46 B.R. 903, 913-14 (Bkrtcy. E.D. Tenn. 1985); *In re Head*, 26 B.R. 578, 580 (Bkrtcy. M.D. Fla. 1983); *In re McCormick*, 5 B.R. 726, 730 (Bkrtcy. N.D. Ohio 1980).

9. The interest debt under the RTS thrift certificate was incurred upon the issuance of such certificate. *In re Acme-Dunham, Inc.*, 50 B.R. 734, 740-42 (D. Maine 1985); *In re Property Leasing and Management, Inc.*, 46 B.R. at 913-14; *In re Goodman Industries, Inc.*, 21 B.R. 512, 521 (Bkrtcy. D. Mass. 1982).

10. Defendants' claim that they were denied due process and that they have a total and complete setoff because they were not given notice of the RTS bankruptcy proceedings, is not a defense to this avoidance action under 11 U.S.C. §§ 547 and 550. *See* memorandum opinion dated May 1, 1987, in *Re Dobie Langenkamp v. Dennis*, adversary number 85-0337.

11. The trustee did not bring this action pursuant to any provision of the RTS plan of reorganization. Rather this action was commenced pursuant to the trustee's avoiding powers under §§ 547 and 550 of the Bankruptcy Code. *See* memorandum opinion dated May 1, 1987, in *R. Dobie Langenkamp v. Dennis*, adversary proceeding no. 85-0337.

12. Because there is no evidence of inequitable or improper conduct by the trustee, the successor trustee, or their agents, as a matter of law, the successor trustee is not estopped from pursuing the remedies available against the defendants in this adversary proceeding under §§ 547 and 550 of the Bankruptcy Code. In the alternative, and even assuming arguendo that the conduct complained of by defendants was proven, such conduct would not constitute a defense to an action for recovery pursuant to 11 U.S.C. §§ 547 and 550.

13. The plaintiff has established all of the elements under § 547(b) of the Code to avoid the transfers and to recover the amount of the transfers from the defendants under § 550(a) of the Code, less the $9,229.34 in agreed new value, for a total net recovery of $397,770.66.

14. Under the decisions interpreting 28 U.S.C. § 1961, prejudgment interest is recoverable in actions under §§ 547 and 550 from the date of demand for return of the transfer, or if no formal demand is made, from the date of the filing of the adversary proceeding seeking the return. *See e.g., In re H.P. King Company, Inc.*, 64 B.R. 487 (Bkrtcy. E.D.N.C. 1986); *In re AOV Industries, Inc.*, 62 B.R. 968 (Bkrtcy. D.D.C. 1986); *In re Universal Clearing House Co.*, 60 B.R. 985 (Bkrtcy. D. Utah 1986); *In re Production Steel, Inc.*, 60 B.R. 4 (Bkrtcy. M.D. Tenn. 1986). Based upon the records maintained by the United States Court Clerk for the Northern District of Oklahoma and pursuant to the directives of 28 U.S.C. § 1961, the interest rate applicable at the time of the filing of this adversary proceeding was 7.87 percent per annum. Plaintiff is therefore entitled to interest on the sum of $397,770.66 at the rate of 7.87 percent per annum, compounded annually,

from October 23, 1985 through the date of the entry of judgment herein. Thereafter, pursuant to 28 U.S.C. § 1961, interest on the total of the principal amount, plus all interest accrued at the prejudgment rate to that time, shall be calculated at the then applicable rate of interest pursuant to 28 U.S.C. § 1961, until paid.

15. The Court finds that judgment should be entered in favor of the plaintiff herein, and against defendants in the total sum of $397,770.66 in principal, together with interest accrued thereon from October 23, 1985 until the entry of judgment herein at the rate of 7.87 percent per annum, and thereafter accruing at the then applicable rate under 28 U.S.C. § 1961 until paid, together with costs incurred by plaintiff in connection herewith. Judgment shall be entered accordingly in conformity with Rule 7054, Rules of Bankruptcy Procedure.

DATED this 26 day of June, 1987.

BY THE COURT:

/s/ Glen E. Clark

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

This is to certify that a copy of the attached Findings of Fact and Conclusions of Law was mailed to the following this 6th day of July , 1987.

Sam G. Bratton, II, Esq.
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/s/ Reine Forrester

Secretary to Judge Wilson
United States Bankruptcy Court
for the District of Oklahoma

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 84-01461
(Chapter 11)

[File Stamped 7/6/87]

Adversary No. 85-0319

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY
(d/b/a Western Trust and Savings Company),
Debtor.

R. DOBY LANGENKAMP,
Successor Trustee,
Plaintiff,

vs.

C. A. CULP, JULIA CULP, and
CULP DISTRIBUTING COMPANY, INC.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial before the Court on June 1, 1987. The plaintiff was represented by Sam G. Bratton, II, John J. Carwile, and Richard H. Foster, of Doerner, Stuart, Saunders, Daniel & Anderson, Tulsa, Oklahoma; defendants were represented by Chris Economou, Tulsa, Oklahoma. Trial was concluded on June 5, 1987, at which time the Court took this matter under advisement.

The Court, now having duly considered the evidence presented to it, together with the memoranda and arguments

of counsel, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is the successor trustee of the estate of Republic Trust & Savings Company, d/b/a Western Trust & Savings Company (hereinafter "RTS"), the debtor in the above-entitled bankruptcy proceeding.

2. This chapter 11 bankruptcy proceeding was commenced on September 24, 1984.

3. Jack D. Jones was appointed trustee in the case on October 31, 1984.

4. R. Dobie Langenkamp was appointed successor trustee in the case on May 9, 1986, effective May 16, 1986.

5. RTS was an uninsured financial institution, principally engaged in the business of issuing evidence of debt and the making of commercial and personal loans, both secured and unsecured.

6. On or about November 15, 1983, in exchange for $5,648.67, RTS issued to defendants C.A. Culp and Julia Culp that certain thrift certificate, number 1402221, dated November 15, 1983, in the principal amount of $5,648.67.

7. On or about December 8, 1983, in exchange for $6,892.17, RTS issued to defendants C.A. Culp and Julia Culp that certain thrift certificate, number 1402370, dated December 8, 1983, in the principal amount of $6,892.17.

8. On or about August 25, 1983, in exchange for $10,000.00, RTS issued to defendant Culp Distributing Company that certain thrift certificate, number 1401837, dated August 25, 1983, in the principal amount of $10,000.00.

9. On or about January 13, 1984, in exchange for $13,928,76, RTS issued to defendant Culp Distributing Company that certain thrift certificate, number 1401412, dated January 13, 1984, in the principal amount of $13,928.76.

10. During the 90-day period prior to the commencement of this bankruptcy case, defendants C.A. Culp and Julia Culp had and maintained RTS passbook certificate number 1900403.

11. During the 90-day period before the date of filing of the bankruptcy petition herein, RTS made the following payments to or for the benefit of the defendants C.A. Culp and Julia Culp, to-wit:

Date	Amount
August 27, 1984	$18,000.00
September 17, 1984	$30,765.27

12. During the 90-day period before the date of filing of the bankruptcy petition herein, RTS made the following payments to or for the benefit of the defendant Culp Distributing Company, to-wit:

Date	Amount
August 27, 1984	$11,200.59
September 14, 1984	$14,830.83

13. The foregoing payments were made through the following checks from RTS, to-wit:

Date	Check No.	Amount of Check
August 27, 1984	16492	$11,200.59
August 27, 1984	16493	$18,000.00
September 17, 1984	17060	$30,765.27

14. The foregoing checks were drawn against RTS's operating account with First City Bank, of Oklahoma City, Oklahoma.

15. Defendants C.A. Culp and Julia Culp received from RTS the RTS checks numbers 16493 and 17060.

16. Defendant C.A. Culp endorsed and negotiated the RTS checks numbers 16493 and 17060.

17. Defendant Culp Distributing Company received from RTS the RTS check number 16492.

18. Defendant Culp Distributing Company endorsed and negotiated the RTS check number 16492.

19. The foregoing checks were honored by First City Bank.

20. RTS check number 16492, in the amount of $11,200.59, was issued in payment of RTS's thrift certificate number 1401837 and pursuant to the terms thereof.

21. RTS check number 16493, in the amount of $18,000.00, was issued in partial payment of RTS's passbook certificate number 1900403 and pursuant to the terms thereof.

22. RTS check number 17060, in the amount of $30,765.27, was issued in partial payment of RTS's passbook certificate number 1900403, and in payment of RTS's thrift certificates numbers 1401412, 1402221, 1402370, pursuant to the terms thereof.

23. With respect to the $18,000.00 payment and $30,765.27 payment, defendants C.A. Culp and Julia Culp were initial transferees of the foregoing payments or were entities for whose benefit such payments were made. Additionally, $14,830.83 of the $30,765.27 payment was made

for the benefit of defendant Culp Distributing Company. With respect to the $11,200.59 payment, defendant Culp Distributing Company was the initial transferee of the foregoing payment or was the entity for whose benefit such payment was made.

24. The principal asset of RTS was its loan portfolio.

25. The liabilities of RTS consisted primarily of its obligations to purchasers of its thrift certificates and passbook thrift certificates.

26. RTS was primarily a collateral lender.

27. Prior to September 24, 1984, RTS routinely engaged in unsafe and unsound lending practices. These practices included:

(a) RTS did not properly evaluate loan requests in terms of credit history, character, capacity to repay, collateral value, or adequacy of capital or net worth;

(b) RTS did not evaluate loan requests with respect to the effects of worsening economic conditions;

(c) RTS and its borrowers did not agree upon a loan repayment program at the time of loan origination;

(d) RTS made loans that did not provide for periodic payments;

(e) RTS made and reviewed loans without adequate collateral appraisals or title searches;

(f) RTS deferred and extended loans without full payment of interest and reduction of principal;

(g) RTS made an inordinate number of loans to officers and directors, their relatives and other

corporations or entities controlled by them, wholly without adequate security for the loans or other reasonable prospects for repayment;

(h) RTS failed to recognize or establish adequate loan loss reserves against nonperforming or poor quality loans;

(i) RTS intentionally misrepresented the quality or character of nonperforming or low quality loans and took affirmative actions to disguise the true quality of such loans.

28. On June 29, 1984, through a corporate reorganization referred to as "the d investiture," ownership of RTS was transferred from its parent corporation, Republic Bancorporation, Inc. ("Old RBI") to a newly formed parent corporation, also known as Republic-bancorporation, Inc. ("New RBI"). Prior to the divestiture, Old RBI was indebted to RTS in the amount of $1.5 million. In the divestiture transaction, this debt was transferred to New RBI. As a result of the divestiture, RTS encountered significant and devastating liquidity problems, and the divestiture seriously impaired RTS's ability to raise capital.

29. The general ledger balance sheets for RTS show the loan to RBI of $1.5 million to either Old RBI or New RBI as an asset for every day during the period between June 25, 1984 and September 24, 1984.

30. On the date of the transfers, and at all times during the 90-day period before bankruptcy, New RBI was completely unable to repay the $1.5 million loan, and the fair value of this loan was zero.

31. Between July 18, 1984 and September 24, 1984, Republic Financial Corporation ("RFC") sold to RTS 259 loans, in the total principal amount of $9,122,666.25. As of

July 30, 1984, RFC had sold only two of such loans to RTS, in the total principal amount of $77,112.38.

32. The debtor's schedules list property owned by the debtor of $35,281,332.86 and debts of $37,555,733.26, as of September 24, 1984, the date of the filing of RTS's petition.

33. Harold J. Madigan, an independent loan portfolio expert, rendered an opinion that on June 25, 1984, RTS's loan portfolio was overvalued in the amount of at least $4,292,806.00, and he further rendered an opinion that a write-down or reserve against these loans in this amount was appropriate. A write-down or reserve against these loans in the amount of the overvaluation would render RTS insolvent on June 25, 1984.

34. Richard Spillers, of Touche, Ross & Co., retained by the trustee, rendered an opinion that on June 25, 1984, RTS's assets were overvalued in the amount of at least $4,259,000.00. Spillers further rendered an opinion that a write-down or reserve against the assets of RTS in the amount of the overvaluation would render RTS insolvent on June 25, 1984.

35. Touche, Ross & Co. reviewed the debtor's financial statements for each of the 90 days next preceding the filing of the debtor's petition and was of the opinion that RTS was insolvent on each such date.

36. There were no developments from June 25, 1984 to September 24, 1984 that improved the financial condition of RTS.

37. The affirmative evidence offered by defendants to support their claim of solvency consisted of the testimony of Ansil L. Ludwick, former president of RTS, the testimony

of Paul Anderson, former vice chairman of RTS, the Report of Examination of the Oklahoma Banking Department (effective as of the close of business on July 30, 1984), the opinion of the deputy commissioner of the Oklahoma Department of Banking, and the unaudited daily general ledger balance sheets for RTS prepared during the 90-day period prior to September 24, 1984.

38. From June 25, 1984 to September 24, 1984 the loan portfolio asset values shown on the RTS general ledger balance sheets were overstated.

39. The general ledger balance sheets of RTS are unreliable evidence of RTS's financial condition or its asset value from June 25, 1984 to September 24, 1984.

40. The testimony of Ansil L. Ludwick and Paul Anderson that RTS was solvent from June 25, 1984 to September 24, 1984 is not credible and is contradicted by the evidence introduced by the plaintiff.

41. The RTS estate's lawsuit against Aetna Casualty and Surety Company ("Aetna") is a contingent, inchoate, and speculative claim, and cannot be rendered available for payment of the RTS estate's debts within a reasonable period of time. The Court finds that this cause of action is an asset of the estate. However, in light of the nature of the claim and the evidence before the Court, for the purposes of the test for insolvency under § 547(b)(3) and the test for greater recovery under § 547(b)(5), the Court finds the value of this asset to be zero.

42. There is no evidence of the existence of any claims or causes of action, other than collections, that could be rendered available for payment of the RTS estate's debts within a book value of the substandard loans. Taking into

account such $830,200.00 difference, the Department's adjusted equity capital and reserves would be a negative $488,000.00.

43. Subsequent to July 30, 1984, the Oklahoma Banking Department ("Department") issued its Report of Examination ("Report") for RTS, such Report being effective as of the close of business on July 30, 1984.

44. The Department's Report showed RTS having an adjusted equity capital and reserves of $342,000.00 on July 30, 1984. The Department's Report further reflected that RTS owned $10,834,000.00 in assets classified as "substandard" by the Department, $81,000.00 in assets classified as "doubtful" by the Department, and $3,297,000.00 in assets classified as "loss" by the Department. In computing the $342,000.00 adjusted equity capital and reserves, the Department wrote off all the $3,297,000.00 of "loss" assets, wrote down 50 percent of the amount of "doubtful" assets, and wrote down no portion of the $10,834,000.00 in "substandard" assets.

45. The fair value of RTS's substandard loans was approximately 90 percent of the $8,302,000.00 book value of such substandard assets. In computing RTS's $342,000.00 in adjusted equity capital and reserves, the Department did not take into account the $8,302,000.00 difference between the fair value and book value of the substandard loans. Taking into account such $830,200.00 difference, the Department's adjusted equity capital and reserves would be a negative $488,000.00.

46. In the Department's Report, the Department did not adversely classify as substandard, doubtful, or loss the specific loans listed hereinbelow. Additionally, in the Department's computation of the $342,000.00 in adjusted equity capital and reserves, the Department did not take into account the differences between the fair values and book values of such specific loans, to-wit:

Name of Borrower	Principal Balance In June 1984	Necessary Reserve In June 1984 For Loan Loss	Adjusted Value Of Loan On June 25, 1984
Ask, Inc.	$ 66,679.00	$ 33,000.00	$33,679.00
Geno's Steak House	$ 47,827.00	$ 47,827.00	-0-
Geno's Steak House	76,654.00	$ 76,654.00	-0-
Ira Crews	$115,000.00	$ 96,000.00	$ 20,000.00
Ira Crews	$ 88,000.00	$ 99,000.00	-0-
Ira Crews	$765,728.00	$447,000.00	$318,728.00
Stanton Nelson	$144,393.00	$ 28,000.00	$116,393.00
HMC Resources Corp.	$ 86,810.00	$ 86,810.00	-0-
SkyFlite, Inc.	$276,686.00	$200,000.00	$ 76,686.00

Continued from Previous Page

Name of Borrower	Principal Balance In June 1984	Necessary Reserve In June 1984 For Loan Loss	Adjusted Value Of Loan On June 25, 1984
Timbercrest Co., Inc.	$ 55,885.00	$ 55,885.00	-0-
Western World Properties, Inc.	$ 99,790.00	$ 99,790.00	-0-
Western World Properties Inc.	$100,000.00	$100,000.00	-0-
John R. Cain	$ 19,000.00	$ 19,000.00	-0-
John R. Cain	$ 13,858.00	$ 13,858.00	-0-
John R. Cain	$ 12,000.00	$ 12,000.00	-0-
Campus East Development	$116,000.00	$ 53,000.00	$63,000.00
Total	$2,084,310.00	$1,467,824.00	$615,486.00

47. On June 25, 1984, the fair value of RTS's debts exceeded the fair value of its assets.

48. On each and every day in the period from June 25, 1984 to September 24, 1984, and including the date of the transfers at issue, the sum of RTS's debts exceeded the fair value of its assets.

49. The Court finds that the evidence establishing the debtor's insolvency on the date of the filing of the

bankruptcy petition is relevant and probative of the amount which the defendants would have received had this been a case under chapter 7 of the Bankruptcy Code, the transfers had not been made, and the defendants received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

50. The transfers at issue enabled the defendants to receive more than they would have received if the case were a case under chapter 7 of the Bankruptcy Code, the transfers had not been made, and the defendants received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

51. The transfers were in payment of a debt incurred in the ordinary course of business or financial affairs of RTS.

52. The transfers were made in the ordinary course of business or financial affairs of RTS.

53. The transfers were made according to ordinary business terms.

54. The transfers were made in payment of a debt incurred in the ordinary course of business or financial affairs of the defendants.

55. The transfers were made in the ordinary course of business or financial affairs of the defendants.

56. Defendants have failed to establish by clear and convincing evidence that RTS obtained any funds from defendants through false, fraudulent, or misleading representations or statements of material fact. Defendants further have failed to establish by clear and convincing evidence that they reasonably relied on any false,

fraudulent, or misleading misrepresentations in purchasing certificates. Defendants further have failed to establish by clear and convincing evidence that they were fraudulently induced to purchase any certificates.

57. RTS routinely and regularly commingled all funds received through the sale of its thrift certificates or passbook savings certificates, in operating accounts with Sunbelt Bank and Trust, of Tulsa, Oklahoma, and First City Bank, Oklahoma City, Oklahoma. Defendants have failed to introduce any evidence showing that they can trace the funds paid to RTS for the purchase of any certificates.

58. The defendants have failed to establish that the postpetition conduct of the trustee, successor trustee, or their agents was improper, or grossly inequitable. To the contrary, this Court specifically notes as follows:

(a) After a hearing held on March 21, 1986, and in its order dated March 21, 1986 in the RTS case, this Court finds that notice and confirmation of the RTS plan of reorganization was proper in all respects and was approved;

(b) After a hearing held on October 8, 1986, and in its order of October 15, 1986, this Court affirmed and approved the successor trustee's abandonment of, and decision to not pursue preference claims of less than $5,000.00 and to not seek to avoid or recover transfers of funds between RTS and RFC; and

(c) After a hearing on September 23, 1985, and in its order dated December 4, 1985, entered in both the RTS and RFC bankruptcy cases, this Court approved the omnibus settlement agreement between the RTS and RFC estates.

CONCLUSIONS OF LAW

1. RTS is qualified to be a debtor under 11 U.S.C. § 109 and this Court has jurisdiction over the subject matter of this adversary proceeding. *See* order entered January 19, 1986 in *In re Republic Financial Corp.*, case number 84-01460, in the United States Bankruptcy Court for the Northern District of Oklahoma, *and In re Republic Trust & Savings Company*, 59 B.R. 606 (Bkrtcy. N.D. Okla. 1986); *affirmed by* order entered March 19, 1987 in the United States District Court for the Northern District of Oklahoma, case numbers 86-C-77-B and 86-C-312-B (consolidated).

2. The RTS bankruptcy case was commenced prior to October 8, 1984, and the 1984 Amendments to Section 547 of the Bankruptcy Code are not applicable to this adversary proceeding. Memorandum opinion dated May 1, 1987, in *R. Dobie Langenkamp v. Dennis*, adversary number 85-0337, United States Bankruptcy Court for the Northern District of Oklahoma.

3. The defendants have no right to a trial by jury of this adversary proceeding. Order entered February 26, 1987, in *R. Dobie Langenkamp v. Saied*, adversary number 85-0302, United States Bankruptcy Court for the Northern District of Oklahoma; *see also In re Southern Industrial Banking Corp.*, 70 B.R. 196, 201-202 (E.D. Tenn. 1986).

4. The principal debts under the RTS thrift certificates were incurred upon the issuance of such thrift certificates. See memorandum opinion dated May 1, 1987, in *R. Dobie Langenkamp vs. Dennis*, adversary number 85-0337, in the United States Bankruptcy Court for the Northern District of Oklahoma; *Barash v. Public Finance Corporation*, 658 F.2d 504, 509-511 (7th Cir. 1981); *In re Property Leasing*

& Management, Inc., 46 B.R. 903, 913-14 (Bkrtcy. E.D. Tenn. 1985); *In re Head*, 26 B.R. 578, 580 (Bkrtcy. M.D. Fla. 1983); *In re McCormick*, 5 B.R. 726, 730 (Bkrtcy. N.D. Ohio 1980).

5. The interest debts under the RTS thrift certificates were incurred upon the issuance of the certificates. *In re Acme-Dunham, Inc.*, 50 B.R. 734, 740-42 (D. Maine 1985); *In re Property Leasing and Management, Inc.*, 46 B.R. at 913-14; *In re Goodman Industries, Inc.*, 21 B.R. 512, 521 (Bkrtcy. D. Mass. 1982).

6. The transfers were made more than 45 days after the debts were incurred. *See* memorandum opinion dated May 1, 1987, in *R. Dobie Langenkamp v. Dennis*, adversary number 85-0337.

7. The defendants were, by virtue of the foregoing thrift certificates, creditors of RTS. See *In re Republic Trust & Savings Company*, 59 B.R. at 613.

8. The transfers were made for or on account of antecedent debts owed by RTS to the defendants before such transfers were made.

9. Defendants' claim that they were denied due process and that they have a total and complete setoff because they were not given notice of the RTS bankruptcy proceedings, is not a defense to this avoidance action under 11 U.S.C. §§ 547 and 550. *See* memorandum opinion dated May 1, 1987, in *R. Dobie Langenkamp v. Dennis*, adversary number 85-0337.

10. The payments by RTS to defendants were not settlement payments for a security within the meaning of 11 U.S.C. §§ 546(e) and 741(8). 11 U.S.C. § 741, *et seq.* governs liquidation of stockbroking entities, not financial

entities such as RTS. *See generally* 4 COLLIER ON BANKRUPTCY, ¶ 741 et seq., subchapter III (15th ed. 1986); *cf. Baroff*, 497 F.2d at 282-283; *In re Hanover Square Securities*, 55 B.R. 235, 237-239 (Bkrtcy. S.D.N.Y. 1985); *In re John Muir & Co.*, 51 B.R. 150, 152-153 (Bkrtcy. S.D.N.Y. 1985). RTS was not a stockbroker or stockbroking entity, and RTS's payments to its creditors under RTS thrift certificates were not made from or for a securities account or securities accounts.

11 U.S.C. § 741 supplies definitions "for this subchapter." In particular, § 741(2)(A) defines "customer," as "an entity with whom the debtor deals as a principal or agent and that holds a claim against the debtor on account of a security received, acquired, or held by the debtor in the *ordinary course of business as a stockbroker* from or for the securities account or accounts of such entity." The definition of "customer" contained in 11 U.S.C. § 741(2) is based upon the definition found in the Security Investor Protection Act ("SIPA"), 15 U.S.C. § 78111(2). 4 COLLIER ON BANKRUPTCY, at ¶ 741,02, 741-5.

Purchasers of RTS thrift certificates were not "customers" as that term is used in 11 U.S.C. § 741 *et seq.* The defendants therefore were not securities "customers" under the Bankruptcy Code or the SIPA. *Cf. SEC v. Baroff*, 497 F.2d 280, 282-285 (2nd Cir. 1974); *cf. Securities Investor Protection Corporation v. Executive Securities Corp.*, 423 F.Supp. 94, 96-98 (S.D.N.Y. 1976), *aff'd* 556 F.2d 98 (2nd Cir. 1977). If an individual RTS creditor was not a "customer," then the debtor, RTS, would not be a stockbroker as defined by 11 U.S.C. § 101(46) with regard to its transactions with its creditors. 4 COLLIER ON BANKRUPTCY, ¶ 741.02, 741-10. This Court has already

determined that purchasers of Republic thrift certificates were creditors with an unsecured claim. *See, e.g., In re Republic Trust & Savings Co.*, 59 B.R. 606, 608, 613 (Bkrtcy. N.D. Okla. 1986).

11. Defendants have failed to prove the elements of fraud or tracing required to establish a constructive trust. *See In re Heston Oil Co.*, 63 B.R. 711, 714 (Bkrtcy. N.D. Okla. 1986).

12. The trustee did not bring this action pursuant to any provision of the RTS plan of reorganization. Rather this action was commenced pursuant to the trustee's avoiding powers under §§ 547 and 550 of the Bankruptcy Code. *See* memorandum opinion dated May 1, 1987, in *R. Dobie Langenkamp v. Dennis*, adversary proceeding no. 85-0337.

13. Because there is no evidence of inequitable or improper conduct by the trustee, the successor trustee, or their agents, as a matter of law, the successor trustee is not estopped from pursuing the remedies available against the defendants in this adversary proceeding under §§ 547 and 550 of the Bankruptcy Code. In the alternative, and even assuming arguendo that the conduct complained of by defendants was proven, such conduct would not constitute a defense to an action for recovery pursuant to 11 U.S.C. §§ 547 and 550.

14. The plaintiff has established all of the elements necessary to avoid the transfers to defendants under 11 U.S.C. § 547 and to recover the transfers under 11 U.S.C. § 550. The Court concludes that plaintiff is entitled to recover from defendants the sum of $59,965.86 due to the avoidability of the transfers under the theories of law noted above.

15. Under the decisions interpreting 28 U.S.C. § 1961, prejudgment interest is recoverable in actions under §§ 547 and 550 from the date of demand for return of the transfer, or if no formal demand is made, from the date of the filing the adversary proceeding seeking the return. *See, e.g., In re H.P. King Company, Inc.*, 64 B.R. 487 (Bkrtcy. E.D.N.C. 1986); *In re AOV Industries, Inc.*, 62 B.R. 968 (Bkrtcy. D.D.C. 1986); *In re Universal Clearing House Co.*, 60 B.R. 985 (Bkrtcy. D. Utah 1986). Based upon the records maintained by the United States Court Clerk for the Northern District of Oklahoma and pursuant to the directives of 28 U.S.C. § 1961, the interest rate applicable at the time of the filing of this adversary proceeding was 7.87 percent per annum. Plaintiff is therefore entitled to interest on the sum of $59,965.86 at the rate of 7.87 percent per annum, compounded annually, from October 9, 1985 through the date of the entry of judgment herein. Thereafter, pursuant to 28 U.S.C. § 1961, interest on the total of the principal amount, plus all interest accrued at the prejudgment rate to that time, shall be calculated at the then applicable rate of interest pursuant to 28 U.S.C. § 1961, until paid.

16. The Court finds that judgment should be entered in favor of the plaintiff herein, and against defendants in the total sum of $59,965.86 in principal, together with interest accrued thereon from October 9, 1985 until the entry of judgment herein at the rate of 7.87 percent per annum, and thereafter accruing at the then applicable rate under 28 U.S.C. § 1961 until paid, together with costs incurred by plaintiff in connection herewith. Judgment shall be entered accordingly in conformity with Rule 7054, Rules of Bankruptcy Procedure.

DATED this 26th day of June, 1987.

BY THE COURT:

/s/ Glen E. Clark
GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

This is to certify that a copy of the attached Findings of Fact and Conclusions of Law was mailed to the following this 6th day of July, 1987.

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/s/ Reine Forrester
Secretary to Judge Wilson
United States Bankruptcy Court
for the District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 87-C-616-C No. 87-C-618-C No. 87-C-619-C

[File Stamped 6/30/88]

REPUBLIC FINANCIAL CORPORATION,
an Oklahoma corporation,
Debtor.

P. A. HACKLER and DELORES HACKLER,
KENNETH D. and MARY L. MOORE, and
KEMAL SAIED and CONSTANCE SAIED,
Appellants,

vs.

R. DOBIE LANGENKAMP, Successor Trustee,
Appellee.

No. 87-C-617-C No. 87-C-620-C No. 87-C-692-C

REPUBLIC TRUST & SAVINGS COMPANY, dba
Western Trust and Savings Company,
Debtor.

C. A. CULP, JULIA CULP, and
CULP DISTRIBUTING COMPANY;
HATTIE LOU GESIN; and
LEROY DENNIS and JANET DENNIS,
Appellants,

vs.

R. DOBIE LANGENKAMP, Successor Trustee,
Appellee.

(Consolidated Under
No. 87-C-616-C)

ORDER

Now before the Court for its consideration are the consolidated appeals filed by appellants P. A. Hackler and Delores Hackler, C. A. Culp, Julia Culp and Culp Distributing Company, Kenneth D. and Mary L. Moore, Kemal Saied and Constance Saied, Hattie Lou Gesin, and LeRoy Dennis and Janet Dennis (collectively the appellants) from the judgments rendered against them and in favor of appellee R. Dobie Langenkamp, Successor Trustee of the Estates of Republic Financial Corporation (RFC) and Republic Trust & Savings Co. (RTS) (Successor Trustee), based on a finding that the monies received by the appellants from Republic Financial Corporation or Republic Trust & Savings Co. within 90 days of the filing of bankruptcy by these entities, were avoidable preferences pursuant to 11 U.S.C. §547, after a consolidated non-jury trial conducted before the Honorable Glenn E. Clark, United States Bankruptcy Judge (sitting by designation), on June 1-5, 1987.

The appellants raise five separate arguments on appeal, which shall be addressed in turn.

I.

Initially, the appellants contend that they were improperly denied a jury trial in the proceedings below. The United States Court of Appeals for the Tenth Circuit has previously addressed this issue, stating:

> [t]he right to a jury trial in bankruptcy proceeding is purely statutory. There is no constitutional right to such trial as bankruptcy proceedings are equitable in nature.

In re Beery, 680 F.2d 705, 710 (10th Cir.), *cert. denied*, 459 U.S. 1037 (1982) (citing *Katchen v. Landy*, 382 U.S. 323 (1966). However, inasmuch as the *Beery* decision was not rendered under the presently applicable 1984 Bankruptcy Amendments and Federal Judgeship Act, this Court will address the issue in view of recent authority.

The relevant statutory provision is 28 U.S.C. § 1411(a) which provides that the bankruptcy statutes do not affect the right of trial by jury that one may have regarding a personal injury or wrongful death tort claim. Appellants do not contend that the preference actions in question fall within this provision, and therefore effectively concede that there is at present no statutory right to jury trial available to them. The appellants contend, however, that the Seventh Amendment to the United States Constitution provides a right to a jury trial even within the bankruptcy universe. The decision in *Beery*, *supra*, did not specifically address the issue of jury trials in preference actions. There presently exists conflicting authority on the issue.

One view is that when a preference action seeks only monetary damages, it constitutes what has traditionally been characterized as an action at law, as opposed to an equitable cause of action. Under the Seventh Amendment, one is entitled to a jury trial in an action at law. *See Ross v. Bernhard*, 396 U.S. 531 (1970). The other view is that all bankruptcy proceedings are inherently equitable, and that thus no jury trial right exists. The 1984 Amendments divide bankruptcy jurisdiction into "core" and "non-core" proceedings. Proceedings dealing with preferences and fraudulent conveyances are denominated as "core" proceedings pursuant to 28 U.S.C. §157(b)(2)(F) and 28 U.S.C. §157(b)(2)(H), respectively. In essence, courts who

take this view hold that even a traditional legal action, by being termed a core proceeding, undergoes a *conversion* into an equitable proceeding to which the right to jury trial does not attach. The two views are summarized in *In re Adams, Browning & Bates*, Ltd., 70 B.R. 490 (Bankr. E.D.N.Y. 1987).

Upon review, this Court finds that the greater weight of support in existing authority favors the second view. In *Katchen v. Landy*, 382 U.S. 323 (1966), the Supreme Court stated:

> "So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they *become* cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

Id. at 337 (quoting *Barton v. Barbour*, 104 U.S. (14 Otto) 126, 134 (1881)) (emphasis added). The Court also noted:

> The Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, §8 of the Constitution to establish uniform laws on the subject of bankruptcy, *converts* the creditor's legal claim into an equitable claim to a pro rata share of the res.

Id. at 336 (emphasis added). This Court is aware of *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932), which contains the statement that "[s]uits to recover preferences constitute no part of the proceedings in bankruptcy but concern controversies arising out of it." Id. at 94-95. In

Katchen v. Landy, the Supreme Court cited *Schoenthal* for the proposition that a creditor "might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding". *Katchen*, 382 U.S. at 336, (i.e., by making a claim, one submitted oneself to the bankruptcy court's jurisdiction under the old summary / plenary jurisdiction dichotomy.) This issue has been resolved, in those decisions which this Court views as better reasoned, by concluding that Congress has made the decision to name preference actions as "core" proceedings, thus performing the constitutional *conversion* from legal claim to equitable proceeding approved in *Katchen*. *See In re Harbour*, 840 F.2d 1165, 1178 (4th Cir. 1988) (core proceeding assumes historical equitable posture of all such bankruptcy proceedings); *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1349 (11th Cir. 1988) (core proceeding is inherently equitable in nature); *In re Southern Industrial Banking Corp.*, 66 B.R. 370, 374-75 (Bankr. E.D.Tenn.) (statement in *Schoenthal* that preference actions are not part of bankruptcy proceedings, "is no longer true and there is implicit congressional intent that preference actions be tried without a jury"). This Court has concluded that the appellants had no constitutional right to jury trial in these actions, and that the judgments should not be reversed on that basis.

II

In 1984, Congress amended Title 11 of the United States Code by enacting the 1984 Bankruptcy Amendments and Federal Judgeship Act (1984 Act). Section 553(a) of the 1984 Act provides:

> Except as otherwise provided in this Section the amendments made by this title shall become

> effective to *cases* filed 90 days after the date of enactment of this Act.

(emphasis added). The date of enactment was July 10, 1984. The ninetieth day after this date -- October 8, 1984 -- was a holiday; therefore, the effective date of the amendments was October 9, 1984. The pre-1984 Act version of 11 U.S.C. § 547(c)(2) provided as follows:

> (c) The trustee may not avoid under this section [§ 547] a transfer --
>
> (2) to the extent that such transfer was --
>
> (A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made not later than 45 days after such debt was incurred;
>
> (C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (D) made according to ordinary business terms;

The parties stipulate that defendants have satisfied § 547(c)(2)(A), (C) and (D). However, the 1984 Act repealed § 547(c)(2)(B), thereby doing away with the 45-day rule. The parties do not dispute that the defendants did not satisfy the 45-day rule. However, the defendants argue that the term "cases" in Section 553(a) of the 1984 Act does not merely refer to the filing of a bankruptcy petition, but "all actions, suits or controversies arising in or related to a case under Title 11 -- the total body of litigation related to a bankruptcy proceeding." (Appellants' Brief at 22). This

argument was addressed in *In re Chase & Sanborn Corp.*, 51 B.R. 736 (Bankr. S.D.Fla. 1985) as follows:

> Defendant has argued that the effective date provision quoted above should be applied as though Congress had specified that the amendment is applicable to "adversary proceedings" filed on or after October 8, 1984 rather than bankruptcy "cases" filed after that date. This argument presupposes that Congress was unaware of the distinct meaning each of these terms has acquired in the bankruptcy law since the 1973 adoption of the bankruptcy rules, which first introduced adversary proceedings. I reject this contention.
>
> It is apparent from a review of the 1984 Act that the two terms are used with precision in many other provisions where the context makes it clear that the terms were intended to have their customary meaning. A similar effective date provision was contained in the Bankruptcy Reform Act of 1978, Pub.L. 94-598 §403(a), which also employed the word "case" and provided that all matters and proceedings in or relating to any such "case" would be determined under the former Act as if the 1978 amendment had not been enacted. Without dissent, that provision has been applied literally, giving the customary bankruptcy meaning to the term "case". *Nicholson v. First Investment Co.*, 705 F.2d 410, 411 n.1 (11th Cir. 1983). There is no reason to assume less precision in the selection of the same term for the same purpose by Congress six years later. I conclude that the former 45-day provision in § 547(c)(2) is applicable for the purposes of this case and, therefore this adversary proceeding.

Id. at 738. *See also In re Amarex, Inc.*, 74 B.R. 378, 382 (Bankr. W.D.Okla. 1987). These adversary proceedings were filed in 1985. Therefore, this Court concludes that the 45-day rule applies, as the lower court found.

III

The appellants contend that they were denied due process in that they constitute creditors of the estate and should have received notice so as to participate in the proceedings leading to confirmation of the reorganization plan. The Bankruptcy Code does recognize a claim arising from the recovery of avoided preferences, which are treated as pre-petition claims. 11 U.S.C. § 502(h).

The appellants place principal reliance upon *Reliable Elec. Co., Inc. v. Olson Const. Co.*, 726 F.2d 620 (10th Cir. 1984). In *Reliable*, the appellate court held that the holder of a pre-petition unsecured claim was denied due process by not receiving adequate notice of the confirmation hearing. The appellate court affirmed the holding of the lower court that the creditor's claim was therefore not subject to the confirmed plan of reorganization.

The identical argument, including reliance upon the *Reliable* decision, was presented to the court in *In re Southern Indus. Banking Corp.*, 66 B.R. 349 (Bankr. E.D.Tenn. 1986). The court stated:

> [the claim at issue in *Reliable* differs] materially from the rights defendants assert as claims. None of the creditors in those cases asserted a claim contingent upon, or arising as a result of, the exercise of an avoidance power in bankruptcy. Instead, each of the four cases involved an identifiable creditor with a claim actually arising prepetition.

"Claim" is broadly defined in §101(4) to assure the debtor a fresh start. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S.Code Cong. & Adm.News 5787, 5963, 6266. Congress wanted to assure that a debtor be able to obtain "the broadest possible relief in the bankruptcy court." *Id.* However, in a reorganization case involving an application for the appointment of a legal representative to represent the interests of individuals who may manifest asbestos related diseases in the future, in denying the application, the court observed that: "It is not true that any conceivable claim is contingent." *In re UNR Industries, Inc.*, 29 B.R. 741, 745 (N.D.Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984).

Sustaining defendant's contention that they are creditors within the scope of §101(9)(A) would mean that prepetition transferees of transfers avoidable under §§544, 545, 547, 548, and 553 are entitled to notice and, presumably, to all the rights available to creditors in bankruptcy. Formal notice of bankruptcy proceedings to potential preference defendants has never been customary and perhaps never considered previous to this case. This court is confident that neither Congress nor the Bankruptcy Rules Committee envisioned formal notice of bankruptcy proceedings to transferees of avoidable transfers or their participation in reorganization proceedings until disgorgement of the avoidable transfer. The defendants' prospective rights to file claims, §502(h), are not contingent claims within the circumscription of §101(4)(A). Hence, the defendants are not "creditors" within the scope of §101(9)(A). Further, defendants do not qualify as creditors under §101(9)(B) because to date there has been no recovery of property from

> them pursuant to §550. See §502(h) (a claim arising *from the recovery or property* under §550 shall be allowed or disallowed as if such claim had arisen prepetition).

Id. at 361 (footnote omitted). This Court agrees with the analysis above. The recent decision of *Sheftelman v. Metals Corp.*, 839 F.2d 1383 (10th Cir. 1987) is not to the contrary. Again, *Sheftelman* did not involve preference defendants, but bondholders who held existing pre-petition claims. Preference defendants may not withhold their property, forcing the trustee to initiate a recovery action, while maintaining that they are contingent creditors who deserve notice of the confirmation action. A preference defendant's claim only arises upon recovery of the property. Thus, under appellants' theory, reorganization plans could only be confirmed after the conclusion of all preference actions. Such delay is contrary to the purpose of bankruptcy proceedings. *Cf. In re Amarex*, 74 B.R. 378, 381 (Bankr. W.D. Okla. 1987). Accordingly, the decision of the bankruptcy court will be affirmed on this basis.

IV

The appellants contend that the trial court erred in two findings: (1) that the debtors were insolvent on the dates of the transfers at issue and (2) that appellants received more than they would have under a Chapter 7 liquidation.

Under 11 U.S.C. §547(b)(3) the trustee must prove by a preponderance of the evidence that the challenged transfers were made while the debtor was insolvent. Under 11 U.S.C. §547(b)(5), the trustee must show by the same standard that the transfers enabled the [appellants] to receive more than they would receive if the bankruptcy case were a case under Chapter 7; if the transfer had not been made;

and if the appellants had received payments of the debts as provided by the Code. (Appellants' Brief at 45). The trustee has the burden of proving these elements pursuant to 11 U.S.C. §547(g).

Title 11 U.S.C. §547(f) provides that the debtor is presumed to have been insolvent on and during the ninety days immediately preceding the filing of the bankruptcy petition. At the conclusion of the trial, the bankruptcy court found -- and the trustee does not dispute -- that the presumption of insolvency had been rebutted.

Determination of solvency is a question of fact, subject to the clearly erroneous standard. *Clay v. Traders Bank of Kansas City*, 708 F.2d 1347, 1350 (8th Cir. 1983). *See also In re Mullet*, 817 F.2d 677, 678 (10th Cir. 1987).

> A finding of fact may be deemed "clearly erroneous" only if the finding is without factual support in the record, or if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

Colon-Sanchez v. Marsh, 733 F.2d 78, 81 (10th Cir.) *cert. denied*, 469 U.S. 855 (1984) (citations omitted).

The United States Supreme Court has stated that

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.
>
> . . .
>
> Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) (citations omitted).

The appellants contend that the bankruptcy court admitted incompetent and irrelevant evidence on the insolvency issue. Their argument is that the successor trustee employed a theory of "retrojection" in its presentation of evidence. Retrojection involves the use of a subsequent balance sheet in order to demonstrate insolvency on some date prior to the date of the balance sheet. *See, e.g. In re Kaylor Equip. and Rental, Inc.*, 56 B.R. 58 (Bankr. E.D.Tenn. 1985). The successor trustee denies that it employed retrojection theory, but rather that it introduced evidence that the debtors were insolvent on each day of the 90-day period.

The Court finds that the successor trustee introduced exhaustive evidence by an established accounting firm as to daily balance sheets for every day of the 90-day period. This evidence was bolstered by testimony of Harold Madigan, an independent consultant in the area of valuation of loan portfolios. (Loans receivable were the principal assets of the debtors). Contrary evidence introduced by the appellants was found by the bankruptcy court to not be credible. Under the applicable standard, this Court cannot state that the bankruptcy court's finding of insolvency was clearly erroneous.

Regarding 11 U.S.C. §547(b)(5), the appellants place principal reliance upon *In re Tenna Corp.*, 801 F.2d 819

(6th Cir. 1986). They argue that "the trustee must create a hypothetical Chapter 7 liquidating estate as of the filing date of the bankruptcy case and demonstrate the defendant's standing as a distributor of the estate," (Appellants' Brief at 53), which appellants assert was not done in the case at bar. Appellants focus their discussion of *Tenna* upon the necessity of creating a hypothetical Chapter 7 model. Actually, the *Tenna* court noted that "by definition, in any Chapter 11 proceeding a hypothetical liquidation must be done." *Tenna*, 801 F.2d at 821. Rather, the court was addressing "the narrow issue concerning the appropriate *time* for testing the preferential effect of a payment." *Id.* at 820 (emphasis added). The issue was critical in *Tenna* because during the Chapter 11 proceedings the debtor borrowed funds from two banks to continue its operation. As security for the loans, the bankruptcy court granted the banks super-priority liens on the debtor's property pursuant to 11 U.S.C. §364. *Id.* The bankruptcy court took into account the post-petition accumulated debt in making its §547(b)(5) determination. The Sixth Circuit Court of Appeals held this to be improper, ruling that the hypothetical liquidation must be made as of the date that the bankruptcy petition is filed.

In the case under review, the bankruptcy court found

> that the evidence establishing the debtor's insolvency *on the date of the filing of the bankruptcy petition* is relevant and probative of the amount which the defendants would have received had this been a case under Chapter 7 of the Bankruptcy Code, the transfer had not been made, and the defendant received payment of the debt to them to the extent provided by the provisions of the Bankruptcy Code.

(Finding of Fact 32. Findings of Fact and Conclusion of Law in *Saied*) (emphasis added). This finding indicates that the bankruptcy court did make its §547(b)(5) determination as of the date the bankruptcy petition was filed. Nothing before this Court indicates that the bankruptcy court took account of post-petition debt, as *Tenna* condemns. This Court cannot conclude that the bankruptcy court's determination was erroneous.

V

Finally, the appellants argue that the transfers in question were contemporaneous exchanges for new value, and thus exempt from the avoiding powers of the trustee pursuant to 11 U.S.C. §547(c) (1) which provides as follows:

> (c) The trustee may not avoid under this section a transfer--
>
> (1) to the extent that such transfer was
>
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange;

With respect to the definition of "new value," §547(a)(2) of the 1978 Bankruptcy Code provides as follows:

> (2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under

> any applicable law, but does not include an obligation substituted for an existing obligation;

Payment of long-term debt does not fall within this exception. *See, e.g., In re Candor Diamond Corp.*, 44 B.R. 195 (Bankr. S.D.N.Y. 1984). The defendants' citation of *In re George Rodman, Inc.*, 792 F.2d 125 (10th Cir. 1986) is inapposite. In *Rodman* the court held that a release of a materialman's lien upon an oil well in response to payment of a debt constituted "new value." The court specifically noted that Oklahoma law defines a lien as a property right. *Id.* at 128 n.7. Thrift certificates do not constitute property interests, but rather are evidence of underlying indebtedness. Accordingly, this argument is rejected.

It is the Order of the Court that the consolidated appeal of the appellants herein is hereby DENIED. The judgment of the bankruptcy court is hereby AFFIRMED in all respects.

IT IS SO ORDERED this 30th day of June, 1988.

/s/ H. Dale Cook

H. DALE COOK

Chief Judge, U. S. District Court

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-2182

[File Stamped 3/5/90]

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY,
doing business as Western Trust & Savings Company;
and REPUBLIC FINANCIAL CORPORATION,
an Oklahoma Corporation,
Debtors.

R. DOBIE LANGENKAMP,
Successor Trustee,
Appellee,

vs.

P.A. HACKLER; DELORES HACKLER;
C. A. CULP; JULIA CULP;
CULP DISTRIBUTING COMPANY;
KENNETH D. MOORE; MARY L. MOORE;
KEMEL SAIED; CONSTANCE G. SAIED; HATTIE
LOU GESIN; LEROY DENNIS; and JANET DENNIS,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 87-C-616-C)
(consolidated)

John J. Carwile (Sam G. Bratton II and Richard H. Foster with him on the brief), of Doerner, Stuart, Saunders, Daniel Anderson, Tulsa, Oklahoma, for Appellee.

Tony W. Haynie (William E. Rutledge and Deirdre 0. Dexter with him on the brief), of Conner & Winters, Tulsa, Oklahoma, for Appellants.

Before LOGAN and BALDOCK, Circuit Judges and SAFFELS, District Judge.*

BALDOCK, Circuit Judge.

The debtors, Republic Trust & Savings Company and Republic Financial Corporation, were uninsured financial institutions doing business in Oklahoma. Appellants were holders of thrift and passbook savings certificates issued by the debtors to represent the debtors' promise to repay monies the appellants had invested in them. Between July 5 and September 19, 1984, appellants redeemed their certificates and accepted payments from the debtors aggregating over $713,919. On September 24, 1984, the debtors filed a chapter eleven bankruptcy petition. In October 1985, the bankruptcy trustee instituted adversary proceedings against the appellants seeking to recover the payments as avoidable preferences under 11 U.S.C.

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*Honorable Dale E. Saffles, United States District Judge for the District of Kansas, sitting by designation.

§ 547(b).[1] At the conclusion of a four-day bench trial in June 1987, the bankruptcy court found that the monies appellants received from the debtors within ninety days of the petition's filing constituted avoidable preferences. The district court affirmed the bankruptcy court's judgment. Appellants take exception, asserting that they were entitled (l) to judgment as a matter of law because the exemptions contained in 11 U.S.C. § 547(c)(1) & (2) negated the trustee's avoidance powers, (2) to offset the debtors' payments against the preferential transfers because they were denied due process in connection with the confirmation of the reorganization plans, or (3) to a jury trial. Our jurisdiction over this appeal arises pursuant to 28 U.S.C. § 158(d). We review these questions of law *de novo*, and reverse.

---

[1]Subsection (b) reads in pertinent part:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(l) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition;

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

I.

Under 11 U.S.C. § 547(c)(1), a bankruptcy trustee may not avoid a transfer which meets the requirements of subsection (b)

> to the extent that such transfer was--
>
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a *contemporaneous exchange for new value* given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange.

(emphasis added). Section 547(a)(2) defines new value as "money or money's worth in goods, services, or new credit . . . ." According to appellants, their redemption of thrift and passbook savings certificates in exchange for the debtors' payments constituted a "contemporaneous exchange for new value," because the certificates had "independent value."

In *Holloway v. Peat, Marwick, Mitchell & Co.*, 879 F.2d 772 (10th Cir.), *petition for cert. filed*, ____S. Ct.____ (1989), we recently addressed the nature of thrift and passbook savings certificates in determining that the instruments issued by the debtors were "securities for the purposes of the federal securities laws." *Id.* at 788. We stated:

> [B]oth the passbook savings certificates and thrift certificates are essentially debt instruments, representing a promise by the issuing entity to repay the principal amount, plus accrued interest at a specified rate, within a specified time period or on demand. These instruments will therefore be analyzed

> under the "notes" or "evidence of indebtedness" categories of the statutory definition of "security" [contained in 15 U.S.C. § 78c(a)(10)].

Id. at 777.

Given our description in *Holloway* of the thrift and passbook savings certificates at issue here as "debt instruments, representing a promise by the issuing entity to repay," we conclude that appellants' redemption of the certificates in exchange for the debtors' payments did not constitute new value within the meaning of § 547(c)(1). The certificates were nothing more than evidence of an underlying indebtedness, akin to promissory notes, owed by the debtors to the appellants as holders of the certificates. Appellants ask us essentially to hold that a creditor's transfer of a note upon receipt of a debtor's final payment constitutes a contemporaneous exchange for new value. Because no authority exists to support such a proposition, we decline the invitation.[2] The district court did not err in declining to grant appellants judgment as a matter of law under § 547(c)(1).

II.

The district court's conclusion that appellants were not entitled to judgment under § 547(c)(2) was likewise correct.

[2]Appellants' reliance on *In re George Rodman, Inc.*, 792 F.2d 125 (10th Cir. 1986), is misplaced. In *Rodman*, the debtor transferred $238,842 to the creditor in exchange for the release of an oil well lien in the same amount. Because the creditor released a lien equivalent to the amount of the debtor's transfer, the creditor was entitled to the § 547(c)(1) defense. Unlike the lien in *Rodman*, the certificates in this case do not constitute property susceptible of exchange for the purpose of § 547(c)(1), but rather, only evidence of an indebtedness owed appellants.

Prior to the 1984 amendments to the bankruptcy code, Pub. L. No. 98-353, 98 Stat. 333, subsection (c)(2) prohibited a bankruptcy trustee from avoiding a preferential transfer if the transfer was

> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made not later than 45 days after such debt was incurred;
>
> (C) made in the ordinary course of business or financial affairs of the debtor and transferee; and
>
> (D) made according to ordinary business terms.

11 U.S.C. § 547(c)(2) (amended 1984). The bankruptcy trustee acknowledges that the debtors' payments to appellants comply with the requirements of subsections (A), (C) & (D), while the appellants admit that the payments were not made within 45 days after the debt was incurred as required by subsection (B). Appellants contend, however, that the 45-day rule is inapplicable because the 1984 amendments abolished it. Pub. L. No. 98-353, 462(c), 98 Stat. 378. Thus, we must determine whether the pre- or post-amendment version of § 547(c)(2) applies in this instance.

The effective date of the bankruptcy amendments is contained in Pub. L. No. 98-353, § 553, 98 Stat. 392: "[T]he amendments made by this title shall become effective to *cases* filed 90 days after the date of enactment of this Act." (emphasis added). The amendments were enacted on July 10, 1984, and became effective on October 8, 1984. Because the bankruptcy trustee did not institute adversary proceedings against the appellants until October 1985, a

year after the amendments' effective date, appellants claim the post-amendment version of § 547(c)(2) applies. The trustee asserts, however, that because the debtors filed their bankruptcy petition on September 24, 1984, before the amendments became effective, the pre-amendment version of subsection (c)(2) governs and the 45-day rule bars appellants' defense.

The problem with appellants' position is that it equates the word "cases" appearing in § 553 with the term "proceedings." Preference actions are generally described as proceedings, *see, e.g.*, Bankr. R. 7001, whereas a case commences with the filing of a bankruptcy petition, *see e. g.*, 11 U.S.C. § 301-03. *See generally*, S. Rep. No. 989, 95th Cong., 2d Sess. 153-54, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5939-40 (Senate Report to Bankruptcy Reform Act of 1978). Lower courts have consistently recognized this difference in applying the pre-amendment version of § 547(c)(2). *E.g., In re Amarex Inc.*, 74 B.R. 378, 381-82 (Bankr. W.D. Okla. 1987), *aff'd*, 88 B.R. 362, 364 (W.D. Okla.1988) (reference to "cases" in § 553 refers to bankruptcy cases, not adversary proceedings).

Although no circuit court has squarely addressed the meaning of the word "cases" in § 553, in *Fidelity Sav. & Inv. Co. v. New Hope Baptist*, 880 F.2d 1172, 1175 n.2 (10th Cir. 1989), we recently endorsed the view that "cases" refers to bankruptcy cases rather than adversary proceedings: "This amendment [elimination of 45-day rule in § 547(c)(2)] . . . applies to *bankruptcy cases* filed after October 8, 1984." (emphasis added). To support our statement, we cited *In re Sounds Distrib. Inc.*, 80 B.R. 749, 751-52 (Bankr. W.D. Pa. 1987), which held that the

controlling date in determining the applicability of the 1984 amendments was the date the debtors filed their bankruptcy petition rather than the date the trustee commenced adversary proceedings. *See also In re Bullion Reserve*, 836 F.2d 1214, 1217 n.2 (9th Cir.), *cert. denied*, 108 S. Ct. 2824 (1988) (amendment to § 547(c)(2) did not apply because debtor filed its bankruptcy petition in 1983); *In re Energy Co-op Inc.*, 832 F.2d 997, 1000 n.2 (7th Cir. 1987) (45-day requirement applied because § 547(c)(2) amendment applicable only to "bankruptcy cases" filed 90 days after July 10, 1984). Were we to accept appellants' interpretation of the word "cases" in § 553, different legal standards might apply in the same bankruptcy case due to a trustee's decision to commence adversary proceedings on separate dates. This surely was not the intent of Congress in amending the bankruptcy code. The district court properly applied the 45day rule contained in the pre-amendment version of § 547(c)(2) in rejecting appellants' claimed exemption.

III.

The district court also properly rejected appellants' assertion that they were denied due process of law when they failed to receive notice of the time fixed for objecting to the debtors' proposed reorganization plans. The fifth amendment, U.S. Const. amend V, requires that creditors holding claims against a bankruptcy estate must be given reasonable notice of a plan's confirmation hearing before their claims are barred. *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953) (reasonable opportunity to be heard must precede judicial denial of creditor's claimed rights); *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 622-23 (10th Cir. 1984)

(reorganization process requires that creditors be properly notified of steps in the proceeding so they may have an opportunity to protect their property interests). Consistent with this constitutional mandate, Bankruptcy Rule 2002 provides that "all creditors" shall be given at least twenty-five days written notice of "the time fixed for filing objections to and the hearing to consider confirmation of a plan." *See Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383, 1386 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 201 (1988) (actual notice to known creditors required under Bankr. R. 2002).[3]

Appellants, however, are not "creditors" entitled to notice within the purview of Rule 2002. A creditor is defined in 11 U.S.C. § 101(9) as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." Claim is defined in turn as a "right to payment." *Id.* § 101(4). Appellants do not have even a contingent right to payment from the debtors' estates at this point; rather, as defendants in the trustee's adversary proceedings, they may have an obligation or liability to pay the estates the monies transferred to them by the debtors.

[3]Unlike the other appellants, C.A. Culp, Julia Culp, Culp Distributing Company, LeRoy Dennis and Janet Dennis apparently continued to have monies invested in the debtors at the time of the bankruptcy, and thus filed proof of claims with the bankruptcy court. Although these appellants as scheduled creditors received the requisite notices, their claims were properly disallowed under 11 U.S.C. § 502(d) for purposes of voting on the plans because they had not returned the transfers which the trustee sought to avoid as preferences. Section 502(d) provides in relevant part: "[T]he court shall disallow any claim of any entity . . . that is a transferee of a transfer avoidable under section . . . 547 . . . of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable . . . ."

Until the adversary proceedings are finally adjudicated, the trustee has a claim against the appellants for payment; appellants have a potential duty to pay. Appellants will have a claim against the estates only if the trustee prevails in the adversary proceedings and successfully avoids the debtors' transfers to appellants as preferences under 11 U.S.C. § 547.[4]

Thus, appellants have been afforded all the fifth amendment protection to which they are entitled. The fifth amendment dictates that the federal government may not deprive individuals of property without first affording them due process of law. Any deprivation of property will occur in the trustee's proceedings to avoid the allegedly preferential transfers. Appellants have received ample notice and opportunity to be heard in these adversary proceedings. This appeal is in fact an exercise of appellants' right to be heard. Any claims the appellants have against the debtors' estates will arise only if and after the trustee deprives them of property.[5]

[4]The trustee correctly points out that appellants cannot possibly become creditors of the estates until after the conclusion of the adversary proceedings against them. Otherwise, a transferee who has a valid defense to a preference action and ultimately no liability to the estate would be permitted to vote on and object to a plan of reorganization without ever having any interest in the estate. Thus, appellants' argument is nonsensical. Appellee's Brief at 40.

[5]Appellants' citation to *Reliable Electric*, 726 F.2d at 620, is inapposite. In that case, a construction company had a prepetition claim for breach of contract against the debtor that arose prior to confirmation of the plan. Because the company had not received formal notice of the bankruptcy proceedings, the court refused to discharge the company's claim against the debtor. In contrast, appellants present no claim arising before confirmation of the plan. A claim will arise only if the trustee recovers a judgment against appellants for a preferential transfer. *See In*

IV.

Lastly, appellants contend the district court violated the seventh amendment by denying them a jury trial on the bankruptcy trustee's preference claims. In *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2787 (1989), the Supreme Court recently held that a "person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer." The Court found indistinguishable its earlier decision in *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932), which held that a trustee's action to avoid allegedly preferential transfers was legal rather than equitable. 2793-94. The Court distinguished its decision in *Katchen v. Landy*, 382 U.S. 323 (1966). *Katchen* held that no right to a jury trial existed where a trustee's counterclaim against a claimant of the estate alleged that the payments the claimant sought to recover were avoidable preferences. In other words, because the preference issue arose "as part of the process of allowance and disallowance of claims, it [was] triable in equity." *Id.* at 336. *Granfinanciera* explained: "Our decision [in *Katchen*] turned . . . on the bankruptcy court's having actual or constructive possession of the bankruptcy estate, and its power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate." 109 S. Ct. at 2798. The Court noted that the claimant in *Katchen* "would have been entitled to a jury trial if the trustee had brought a plenary action in federal court." *Id.*

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re Southern Indus. Banking Corp., 88 B.R. 174, 176-77 (Bankr. E.D. Tenn. 1987).

Under *Granfinanciera*, those appellants that did not have or file claims against the debtors' estates undoubtedly are entitled to a jury trial on the issue of whether the payments they received from the debtors within ninety days of the latter's bankruptcy constitute avoidable preferences. Although some of the appellants did file claims against the estates because they continued to have monies invested in the debtors at the time of bankruptcy, *see supra* note 3, we believe they likewise are entitled to a jury trial under the rationale of *Granfinanciera* and *Katchen*. Despite these appellants' claims, the trustee's actions to avoid the transfers, consolidated by the bankruptcy court, were plenary rather than a part of the bankruptcy court's summary proceedings involving the "process of allowance and disallowance of claims."

Accordingly, the judgment of the district court is REVERSED and this cause REMANDED for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
United States Courthouse
Denver, Colorado 80294

Robert L. Hoecker
Clerk

(303) 844-3157
FTS 564-3157

April 10, 1990

Mr. Tony W. Haynie
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2400 First National Tower
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Mr. John J. Carwile
Mr. Richard H. Foster
Mr. Sam G. Bratton, II
Doerner, Stuart, Saunders, Daniel & Anderson
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Tulsa, OK 74103

Re: 88-2182, Republic Trust v. Hackler
(Lower docket: 87-C-692-C, 87-C-620-C,
87-C-619-C, 87-C-618, 87-C-617-C, 87-C)

Dear Counsel:

Enclosing is a copy of an order entered today in the captioned case.

Please call this office if you have questions.

Sincerely,

ROBERT L. HOECKER
Clerk

By: /s/
Deputy Clerk

RLH:tl
Enclosure

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 88-2182

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY,
doing business as Western Trust & Savings Company;
Debtor.

R. DOBIE LANGENKAMP,
Successor Trustee,
Appellee,

v.

P.A. HACKLER; DELORES HACKLER;
C. A. CULP; JULIA CULP;
CULP DISTRIBUTING COMPANY;
KENNETH D. MOORE; MARY L. MOORE;
KEMEL SAIED; CONSTANCE G. SAIED; HATTIE LOU GESIN; LEROY DENNIS; and JANET DENNIS,
Appellants.

ORDER
Filed April 10, 1990

Before Honorable William J. Holloway, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Honorable David M. Ebel, Circuit Judges, and Honorable Dale E. Saffels*, District Judge.

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*The Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc and appellee's petition for rehearing in the captioned case.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and on judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Seymour did not participate.

Entered for the Court

/s/ Robert L. Hoecker
Robert L.Hoecker, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-2182

REPUBLIC FINANCIAL CORPORATION,
an Oklahoma corporation,
Debtor.

P. A. HACKLER and DELORES HACKLER,
KENNETH D. and MARY L. MOORE, and
KEMAL SAIED and CONSTANCE SAIED,
Appellants,

vs.

R. DOBIE LANGENKAMP, Successor Trustee,
Appellee.

REPUBLIC TRUST & SAVINGS COMPANY, d/b/a
Western Trust and Savings Company,
Debtor.

C. A. CULP, JULIA CULP, and
CULP DISTRIBUTING COMPANY;
HATTIE LOU GESIN; and
LEROY DENNIS and JANET DENNIS,
Appellants,

vs.

R. DOBIE LANGENKAMP, Successor Trustee,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIEF OF APPELLEE

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* * *

III. ARGUMENT AND AUTHORITIES

A. Defendants were not entitled to a jury trial in these preference adversary proceedings.

Defendants claim that they were constitutionally entitled to a jury trial in these adversary proceedings under the Seventh Amendment of the Constitution. The Bankruptcy Court and District Court both held that Defendants were not so entitled, and this conclusion is supported by the overwhelming majority of circuit, district and bankruptcy court decisions which have considered this issue.

Defendants rely principally on the Supreme Court's decision in *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932) which they argue entitles them a jury trial right in these preference proceedings. However, they fail to persuasively take into account or deal with limiting aspects of the *Schoenthal* decision, the Supreme Court's subsequent decision in *Katchen v. Landy*, 382 U.S. 323 (1966), Congressional enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. 98-353 (the "1984 Act"), and a number of leading decisions analyzing this jury trial issue.

* * *

Defendants contend that *Katchen* must be construed narrowly and that at best, *Katchen* holds only that preference defendants who have filed claims in a bankruptcy case are not entitled to a jury trial.[1] However, as the Fourth

[1]Defendants apparently concede that at a minimum, the Supreme Court's decision in *Katchen* would preclude any jury trial for the

Circuit in *Harbour* and other courts have observed, *Katchen's* holding and reasoning is not so limited. *See, e.g., In re Harbour*, 840 F.2d at 1176-1177; *Chase & Sanborn*, 835 F.2d at 1349.

* * *

The significant weight of authority, especially the Fourth Circuit's analysis in *Harbour* and the Eleventh Circuit's in *Chase & Sanborn*, supports the denial of a jury trial, which is also consistent with and supported by Seventh Amendment jurisprudence, the history and framework of bankruptcy law and the Bankruptcy Code, and the Supreme Court's landmark decision in *Katchen v. Landy*. The Bankruptcy and District Courts' decisions denying Defendants' demand for a jury trial should be affirmed.

* * *

* * *

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Dennises or the Culps, who were creditors of RTS, and who filed proofs of claim in the RTS Estate, thus submitting to the summary jurisdiction of the Bankruptcy Court. * * *

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-2182

IN RE:

REPUBLIC TRUST & SAVINGS COMPANY,
doing business as Western Trust & Savings Company;
and REPUBLIC FINANCIAL CORPORATION,
an Oklahoma Corporation,
Debtors.

R. DOBIE LANGENKAMP,
Successor Trustee,
Appellee,

vs.

P. A. HACKLER; DELORES HACKLER;
C. A. CULP; JULIA CULP;
CULP DISTRIBUTING COMPANY;
KENNETH D. MOORE; MARY L. MOORE;
KEMEL SAIED; CONSTANCE G. SAIED; HATTIE LOU GESIN; LEROY DENNIS; and JANET DENNIS,
Appellants.

APPELLEE'S PETITION FOR REHEARING

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Corporation

March 17, 1990

* * *

INTRODUCTION

R. Dobie Langenkamp, Appellee and Successor Trustee, pursuant to Fed. R. App. P. 40 and Tenth Circuit Rule 40, petitions this Court for a rehearing on the jury trial issue presented in this appeal. Specifically, the Trustee requests that the Court reconsider its decision that some of the Appellants--C. A. Culp, Julia Culp, Culp Distributing Company, LeRoy Dennis, and Janet Dennis--are entitled to a jury trial. The Trustee believes that a significant fact in the appeal record has been overlooked and that a significant issue has been misconstrued by the Court, creating a conflict with the United States Supreme Court's holding in *Granfinanciera. S.A. v. Nordberg*, 492 U.S._____, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), and with the Ninth Circuit Court of Appeals decision in *In re Corey*, 892 F.2d 829 (9th Cir. 1989). In addition, this Court's decision on this jury trial issue has widespread ramifications for bankruptcy actions and practice throughout this Circuit and the nation. In this case in particular, both Appellants and Appellee submitted their appeal briefs in 1988, before the *Granfinanciera* decision was announced in June, 1989, and

a rehearing will enable this Court to review this critical issue in light of this brief.[1]

ARGUMENT AND AUTHORITIES

A. This Court's finding that a right to a jury trial exists for those defendants who filed claims in the bankruptcy estate is directly contrary to the holding in *Granfinanciera, S.A. vs. Nordberg*.

In its opinion entered March 5, 1990, *see* Exhibit "A" hereto, this Court recognized the stipulated fact that C. A.. Culp, Julia Culp, Culp Distributing Company, LeRoy Dennis and Janet Dennis (hereinafter referred to as the "Creditor-Defendants") were creditors of Republic Trust and Savings Company ("Republic Trust") at the time of the bankruptcy filing, and that these Creditor-Defendants also had filed written proofs of claim in the Republic Trust Estate, Exhibit "A," p.3, footnote 3 and p.11, facts which were not disputed below. The Court nevertheless found that the Creditor-Defendants were entitled to a jury trial on the Trustee's preference claims and reversed and remanded for further proceedings on that ground.

In *Granfinanciera* the Court held:

> We read *Schoenthal* and *Katchen* as holding that, under the Seventh Amendment, a creditor's right to a jury trial on a bankruptcy trustee's preference claim *depends upon whether the creditor has submitted a claim against the estate, not* upon Congress' precise definition of the "bankruptcy estate" or upon *whether Congress chanced to deny jury trials to creditors who have not filed claims* and who are sued by a trustee to recover an alleged preference.

106 L.Ed.2d at 51 (emphasis added).

The direct holding of *Granfinanciera* is that "a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate". *Id.* at 51. Here it was stipulated and undisputed that the Creditor-Defendants submitted claims against the Republic Trust estate. In granting a jury trial to these preference defendants who had "submitted a claim against the Estate", this Court overlooked or misconstrued the holding in *Granfinanciera*.

The Court in *Granfinanciera* expressly explained this critical distinction, reasoning that by filing claims in a debtor's bankruptcy estate, a creditor subjects itself to the bankruptcy court's equitable power. *Granfinanciera*, 106 L.Ed.2d at 51 and 52 n.14 (citing *Katchen v. Landy*, 382 U.S. 323, 335, 86 S.Ct. 467, 475, 15 L.Ed.2d 391 (1966)); *see also In re Corey*, 892 F.2d at 836-837.

Granting a jury trial to all Appellants here, whether or not they submitted a claim against the Republic Trust or Republic Financial estates, misconstrues and renders superfluous the distinction carefully and plainly drawn by the Supreme Court in *Granfinanciera*, and also is in direct conflict with other recent decisions on this precise point. The one other Court of Appeals that has interpreted *Granfinanciera* and squarely addressed this issue has stated

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[1]Appellee does not seek a rehearing on the jury trial issue as it relates to Appellants Kemal Saied, Constance G. Saied, Kenneth D. Moore, Mary L. Moore, P. A. Hackler, Delores Hackler, and Hattie Lou Gesin, who did not file claims in either bankruptcy estate and who Appellee concedes thus are entitled to a jury trial under *Granfinanciera, S.A. v. Nordberg*, 492 U.S. ____, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

that "The Court held that the [s]eventh [a]mendment does not protect a creditor's right to jury trial in a bankruptcy proceeding when that creditor has made claims against the debtor's estate." *In re Corey*, 892 F.2d 829, 836 (9th Cir. 1989). In addition, other courts which have applied and interpreted *Granfinanciera* have consistently viewed the filing of a claim by a preference defendant as the determinative factor in deciding the jury trial issue. *Bayless vs. Crabtree Through Adams*, 108 B.R. 299, 305 (W.D. Okla. 1989); *In re Kroh Bros. Development Co.*, 108 B.R. 710, 712 (W.D. Mo. 1989); *In re Industrial Supply Corp.*, 108 B.R. 799, 800-801 (Bankr. M.D. Fla. 1989); *In re Wheeling-Pittsburgh Steel Corp.*, 108 B.R. 82, 85 (Bankr. W.D. Pa. 1989); *In re Edwards*, 104 B.R. 890, 893 & n.4 (Bankr. E.D. Tenn. 1989); *Matter of O'Sullivan's Fuel Oil Co., Inc.*, 103 B.R. 388, 390 (Bankr. D.Conn. 1989); *In re Fort Lauderdale Hotel Partners, Ltd.*, 103 B.R. 335, 337 (Bankr. S.D. Fla . 1989).

This Court's opinion in this case, however, did not address and is in direct conflict with these authorities, and stands alone in its interpretation of *Granfinanciera*.

B. The allowance or disallowance of the Creditor-Defendants' claims in the Republic Trust Estate *is* at issue in their adversary proceedings and under *Granfinanciera* the Creditor-Defendants have submitted to the summary jurisdiction of the Bankruptcy Court and their preference actions are triable in equity.

In its opinion in this case, this Court also overlooked the critical fact that allowance and disallowance of the CreditorDefendants' claims *is* an integral part of the preference actions against them, which has been pleaded by the Trustee and is at issue in the adversary proceedings, thus

bringing the Creditor-Defendants' preference actions squarely within even the distinction drawn by this Court construing *Granfinanciera*.

All of the Creditor-Defendants filed their proofs of claim *before* the adversary proceedings were commenced by the Trustee. In the initial complaint filed by the Trustee against the Creditor-Defendants, the Trustee expressly requested the disallowance of the Creditor-Defendants' claims in the Republic Trust Estate until the preference amounts were returned. *See* First Amended Complaint, p. 3 Count II, Exhibit "B;" *and* Second Amended Complaint, pp. 3 & 4, Counts II and IV, Exhibit "C" attached hereto. Therefore the preference actions against the Creditor-Defendants are part of "the process of allowance and disallowance of claims" Exhibit "A," slip opn. 11, and even under this Court's analysis the Creditor-Defendants are not entitled to a jury trial.

In *Granfinanciera* the Court stated:

> Citing *Schoenthal v. Irving Trust Co., supra*, approvingly, we expressly stated that, if petitioner had not submitted a claim to the bankruptcy court, the trustee could have recovered the preference only by a plenary action, and that petitioner would have been entitled to a jury trial if the trustee had brought a plenary action in federal court. *See* 382 U.S., at 327-328. We could not have made plainer that our holding in *Schoenthal* retained its vitality: "[A]lthough petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, when the same

issue arises as part of the process of allowance and disallowance of claims, it is triable in equity."

Granfinanciera, 106 L.Ed.2d at 51.

This pronouncement is consistent with, and reinforces the distinction drawn by the Supreme Court that preference defendants who have not filed claims against a debtor's estate are entitled to a jury trial, and those defendants who have filed claims against the estate are not. In its opinion here, this Court has disregarded that distinction and essentially has held that all defendants in a preference action are entitled to a jury trial regardless of whether they have filed claims in a bankruptcy estate and regardless of whether the preference action is a part of the process of allowing, disallowing, and adjudicating their claims. This Court's opinion presently creates a dilemma for lower courts in this Circuit attempting to reconcile *Granfinanciera* and this Court's opinion here. This can and should be avoided by reconsideration of this issue by this Court.

CONCLUSION

Appellee respectfully submits that this Court should reconsider the jury trial issue herein, and should apply the precise holding of *Granfinanciera*, and should affirm the opinion of the District Court in part, by holding that no right to a jury trial exists for those Appellants who have filed claims against the Republic Trust Estate.

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